Petition

NO. 81-545

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TRAVELERS INSURANCE COMPANY

Petitioner

VERSUS

MRS. CONSTANCE A. FENASCI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF THOMAS J. FENASCI, AND ALSO AS NATURAL TUTRIX OF THE MINOR, GERALD P. FENASCI AND THADDEAUS FENASCI, CONSTANCE FENASCI RODRIGUEZ, MICHAEL FENASCI, THOMAS J. FENASCI, JR. AND MRS. RITA BREITLING COOK, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF DONALD EUGENE COOK, AND AS NATURAL TUTRIX OF THE MINOR, JULIE ANN COOK, AND DONNA JEAN COOK, AND MRS. MARIE T. BANNON, INDIVIDUALLY AND AS TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF JOHN A. BANNON, AND LORRAINE M. BANNON DUNCAN AND JOHN A. BANNON, JR.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN C. COMBE, JR.
Counsel for Petitioner
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
18th Floor - 225 Baronne Street
New Orleans, Louisiana 70112
(504 581 - 6641

QUESTIONS PRESENTED FOR REVIEW:

I.

May a United States Court of Appeals disregard substantive controlling state law in a case in which jurisdiction of the court is based solely on diversity of citizenship between the parties?

II.

May a United States Court of Appeals rewrite an insurance contract contrary to the intent and interest of both parties to the contract by holding that under Louisiana law the limits of uninsured motorist coverage available on each vehicle in a fleet must depend upon the number of vehicles in the fleet or does such an interpretation impair the obligations of contract, create an unjustified discrimination against the insurer of a fleet of vehicles and violate the Equal Protection Clause and the Due Process Clause of the United States Constitution?

III.

Does the United States Court of Appeals opinion in extending the application of the Louisiana Uninsured Motorist Statute beyond its stated jurisdictional limits to encompass vehicles which are outside the jurisdiction of the State of Louisiana violate the Full Faith and Credit Clause, the Due Process Clause and the Commerce Clause of the United States Constitution?

LISTING OF ALL PARTIES TO THE PROCEEDING PURSUANT TO RULE 28.1

1. The Travelers Corporation
2. The Travelers Insurance Company
3. The Travelers Indemnity Company of Illinois
4. The Travelers Indemnity Company
5. Constitution Plaza, Inc. (Formerly Broadcast-Plaza, Inc.)
6. Travcan Limited
7. The Travelers Marine Corporation
8. The Massachusetts Company, Inc.
9. TIC Auto Body Co., Inc.
10. The Plaza Corporation (Formerly Constitution Plaza, Inc.)
11. Randall Motor Club, Inc.
12. The Prospect Company
13. Travelers Equities Sales, Inc.
14. The Travelers Investment Management Company
15. Keystone Custodian Funds, Inc.
16. Caribbean Atlantic Life Insurance Company Limited.
17. Travelers Insurance Corporation Proprietary Ltd.
18. Adria-TIC International Holdings, S. A.
19. Wibesla, Inc.
20. The Travelers Corporation of Bermuda Limited
21. Travelers Asset Management International Corporation
22. The Travelers Corporation of Asia Limited
23. Constitution State Management Company
24. The Travelers Pension & Life Insurance Company
25. Derby Advertising, Inc.
26. The Travelers Life Insurance Company (Overseas) Limited
27. The Travelers Reinsurance Company of Bermuda, Limited
28. All parties listed in caption

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FIFTH CIRCUIT

The opinion of the Court of Appeals denying Petition for Rehearing and Petition for Rehearing En Banc, appears at Appendix, *infra*, pp. 33-34.

The opinion of the Court of Appeals affirming the judgment of the District Court is reported at 642 F. 2d 986. (Appendix, *infra*, pp. 19-32).

DISTRICT COURT

The opinion of the District Court was not reported, but the minute entry of the Court dated January 9, 1979 appears at Appendix, *infra*, pp. 1-8 and the minute entry dated August 3, 1979 appears at Appendix, *infra*, pp. 9-18.

The judgment of the court below was entered on April 17, 1981. A Petition for Rehearing and Suggestion for Rehearing En Banc were timely filed and were denied on June 18, 1981. (Appendix, *infra*, pp. 33-34).

This petition for writ of certiorari was filed within ninety days of the date Rehearing was denied.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Provisions construed:

U.S. CONST. amend. XIV §1

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. art. IV §1.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. I §8.

> SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

L.S.A. - R.S. 22:1406 D, as amended by Acts, 1975 No. 494 §1.

> "D. The following provisions shall govern the issuance of uninsured motorist coverage in this state.
> (1) (a) No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury

liability provided by the policy, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom: provided, however, that the coverage required under this Subsection shall not be applicable where any insured named in the policy shall reject the coverage or select lower limits. Such coverage need not be provided in or supplemental to a renewal or substitute policy where the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer.

(b) Any insurer delivering or issuing an automobile liability insurance policy referred to herein, shall also permit the insured, at his request, to increase the coverage applicable to uninsured motor vehicles provided for herein to any amount not in excess of the limits of the automobile liability insurance carried by such insured."

L.S.A. - R.S. 22:1406 D (1) (c)

(c) If the insured has any limits of uninsured motorist coverage in a policy of automobile liability insurance, in accordance with the terms of Subsection D(1), then such limits of liability shall not be increased because of multiple motor vehicles covered under said policy of insurance and such limits of uninsured motorist coverage shall not be increased when the insured has insurance available to him under more than one uninsured motorist coverage provision or policy; provided, however, that with respect to other insurance available, the policy of insurance or endorsement shall provide the following:

With respect to bodily injury to an injured party while occupying an automobile not owned by said injured party, the following priorities of recovery under uninsured motorist coverage shall apply:

(i) The uninsured motorist coverage on the vehicle in which the injured party was an occupant is primary;

(ii) Should that primary uninsured motorist coverage be exhausted due to the extent of damages, then the injured occupant may recover as excess from other uninsured motorist coverage available to him. In no instance shall more than one coverage from more than one uninsured motorist policy be available as excess over and above the primary coverage available to the injured occupant.

L.S.A. - R.S. 32:900

§900. "Motor Vehicle Liability Policy" defined

A. A "Motor Vehicle Liability Policy" as said term is used in this Chapter, shall mean an owner's or an operator's policy of liability insurance, certified as provided in R.S. 32:898 or 32:899 as proof of financial responsibility, and issued except as otherwise provided in R.S. 32:899, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

B. Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: five thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, ten thousand dollars because of bodily injury to or death of two or more persons in any one accident and one thousand dollars because of injury to or destruction of property of others in any one accident.

STATEMENT OF THE CASE

The basis of jurisdiction is diversity of citizenship between the parties, 28 U.S.C. 1332 (a) (1). Applicant, Travelers Insurance Company, a Connecticut corporation, is the insurer of a commercial fleet of vehicles owned by Fischbach & Moore, a national electric contracting concern. The policy provides uninsured motorist coverage to any automobile owned by the named insured.

On July 29, 1977, three employees of Fischbach, while traveling in a company vehicle, were killed in an automobile accident as a result of the negligence of a driver whose vehicle had liability insurance limits of only $10,000.00. Although money can never compensate for this loss, the three plaintiff families, residents of Louisiana and Mississippi, do have their own personal uninsured motorist coverage with their respective insurers and three suits remain pending awaiting final determination of this case. Fenasci, et al. v. Edrington, et al., Appendix *infra*, pp. 35-44; Bannon, et al. v. Edrington, et al., Appendix, *infra*, pp. 45-53; Cook et al. v. Integon, et al., Appendix, *infra*, pp. 54-63.

In order to allow a jury verdict in excess of $1,400,000.00 in favor of the survivors to stand both the District Court and the Court of Appeals have turned their backs not only on applicable state law, and *ALL* prior precedent and logic, but also the United States Constitution by holding that the plaintiffs are entitled to uninsured motorist coverage of $10,000,000.00 under the Travelers policy by allowing plaintiffs to "Stack" $10,000.00 coverage for each vehicle in the national commercial fleet of one thousand vehicles owned by Fischbach.

Petitioner sought review of this unconstitutional interpretation of the contract of insurance and Louisiana's uninsured motorist statute in the trial court by way of motion for summary judgment and motion for new trial. Both were denied.

The constitutional issues were once again raised on appeal, but were not addressed by the court in its opinion (Appendix, *infra*, pp. 19-32), nor were they addressed by the court in denying Travelers' Petition for Rehearing and Petition for Rehearing En Banc. (Appendix, *infra*, pp. 33-34).

ARGUMENT

I.

May a United States Court of Appeals disregard substantive controlling state law in a case in which jurisdiction of the court is based solely on diversity of citizenship between the parties?

The two most recent pronouncements of the Louisiana court system, ***Briley v. Falati***, 367 So. 2d 1227 (La. App. 1979) (Appendix, ***infra*** p. 64) and ***Burns v. Fernandez***, No. 11481, La. 4th Cir. Ct. App. decided June 10, 1981 (Appendix, ***infra***, pp. 74-94) hold unequivocably that "stacking" of uninsured motorist benefits under a commercial fleet policy is not allowed in Louisiana. The ***Briley*** case was decided ***on motion for summary judgment*** and in denying writ application,a unanimous Louisiana Supreme Court stated: "Application denied. The result is correct." 369 So. 2d 1379 (La. 1979) (Appendix, ***infra***, p. 73).

The result of the ***Briley*** case, to which the Louisiana Supreme Court refers in its writ denial, is that "stacking" of uninsured motorist benefits under a commercial fleet policy is not allowed in Louisiana as a matter of law!

For almost two and one-half years, petitioner has attempted to have the United States District Court and the United States Court of Appeals for the Fifth Circuit acknowledge the existence of the ***Briley*** decision and to follow its obligation to apply applicable state law under ***Erie Railroad v. Tompkins***, 304 U.S. 64 (1938). The trial court and the original court of appeals opinion did not even acknowledge the existence of the ***Briley*** case. Finally, in denying rehearing, the per curiam opinion stated: "We do not agree that the decision in ***Briley v. Falati*** requires that we reject the trial court's allowance of 'stacking' of uninsured motorist coverage." (per curiam opinion on petition for rehearing and petition for rehearing en banc

(Appendix, *infra*, p. 34)."

Comparing *Briley* and *Burns* to the aforecited language of the Court of Appeal leaves one as bewildered as was Alice in the following classic confrontation:

> 'When I use a word' (read "case") Hunpty-Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean - neither more nor less.'
>
> 'The question is' said Alice, 'whether you can make words (read "cases") mean so many different things.'
>
> 'The question is' said Humpty-Dumpty, 'which is to be master - that's all.' Carroll, *Through The Looking Glass*, Ch. 6 (1872).

A federal appellate court is not "the master" of state law when exercising diversity jurisdiction - it cannot, and properly should not, overlook controlling state court precedent. To the contrary, the federal appellate court is "the servant" of the state law and as this Court has said on numerous occasions:

> A state is not without law save as the highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state, although the highest court of the state has never passed upon them. ***In those circumstances, the federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule." (Emphasis supplied).***

West v. American Telephone & Telegraph Co., 311 U.S. 223, 236 (1940).

As pointed out in the *West* case, although a writ denial by the highest state court is not essential to the binding force of a state appellate opinion, the fact of a writ denial (such as in *Briley)*, is a fortifying factor the court should consider in applying the state law.

The Court of Appeals for the Fifth Circuit closed its eyes to its obligation to apply state law and attempted to follow the rationale of two older Louisiana decisions, both of which had been expressly and impliedly distinguished by the *Briley* court. These cases were *Deane v. McGee*, 267 So. 2d 699 (La. 1972), and *Holmes v. Reliance Ins. Co.*, 359 So. 2d 1102 (La. App. 1978).

The *Briley* court quoted from *Barbin v. United States Fidelity and Guaranty Co.*, 315 So. 2d 754 (La. 1975):

> . . . The clear intent of *Graham (v. American Cas. Co. of Reading, Penn.* 261 La. 85, 269 So. 2d 22) *Deane*, and the other cited cases is to the effect that if a plaintiff is issued insurance on two or more automobiles, ***pays premiums for two or more different uninsured motorist coverages***, and sustains damages thereunder in excess of the mandatory minimum coverage, he can 'stack' coverages and recover his damages. . . *Briley*, 367 So. 2d at 1228.

The distinction in the *Briley* decision between allowing stacking in family automobile cases but disallowing stacking under a commercial fleet policy could have been anticipated by the Louisiana Supreme Court decision of *Seaton v. Kelly*, 339 So. 2d 731 (La. 1976):

> The clear intent of *GRAHAM* and *DEANE* is that if

> a plaintiff is an ***insured*** under two or more policies or one policy covering two or more automobiles, ***pays premiums or has premiums paid for his benefit for two or more different uninsured motorist coverages, he can accumulate the coverages.*** (Emphasis supplied.) ***Seaton,*** 339 So. 2d at 734.

In the ***Holmes*** case, the court found as a fact that ***separate premiums*** (the ***Deane*** rationale for "stacking") were paid for each vehicle by the insured. In the case at bar there was no multiple premium charge for uninsured motorist coverage - in fact, under the undisputed testimony, there was no charge whatsoever for the minimum uninsured motorist limits provided. (Transcript testimony of Mr. Metcalf, pages 57-58; Appendix, ***infra***, pp. 95-96).

The "available data as to what the state law is" which the Fifth Circuit overlooked or intentionally chose to ignore include:

1. The concept of "stacking" is not contained in the Louisiana Uninsured Motorist Statute. It was a judicially created concept which had never been sanctioned by the Louisiana legislature. To the contrary, within four months after this accident, the Statute was revised to prohibit the result reached in this case: "(c) If the insured has any limits of uninsured motorist coverage in a policy of automobile liability insurance . . . then such limits ***shall not be increased because of multiple motor vehicles covered under said policy of insurance*** . . ." L.S.A. - R.S. 22:1406 (c) as amended by Acts No. 438 and 623, 1977.

2. The ***Briley*** decision was the most recent decision of the Louisiana Appellate Court System on point and that decision was fortified by a unanimous writ denial of the Louisiana Supreme Court ***West v. American Telephone and Telegraph***

Company, Vandenbark v. Owens-Illinois Glass Company, 311 U.S. 538 (1941); *Oklahoma Packing Company v. Oklahoma Gas and Electric Co.*, 309 U.S. 4 (1940).

3. On June 10, 1981, eight days prior to the denial of rehearing in this case, the Louisiana Fourth Circuit Court of Appeals again sanctioned the *Briley* decision in the case of *Burns v. Fernandez, et al.*, reiterating unequivocally that the permissive user of a vehicle insured under a commercial fleet policy would not be allowed to stack coverages for each vehicle in the fleet and that his uninsured motorist benefits would be limited to the single vehicle in which he was riding at the time of the accident.

4. EVERY COURT IN THE UNITED STATES FACED WITH THIS ISSUE HAS UNIFORMLY RULED IN PETITIONER'S FAVOR HOLDING THAT THE CONTRARY RESULT WOULD LEAD TO ABSURD, UNCONSCIONABLE, AND RIDICULOUS RESULTS AND UPSET THE COMMERCIAL INSURANCE STRUCTURE AS IT IS KNOWN.

The Supreme Court of Virginia in addressing the issue has stated that to allow stacking of uninsured motorist benefits under commercial fleet policies would: ". . . make a new contract for the parties and distort the meaning of the statute. This would extend the benefits granted and broaden the risks imposed to a degree obviously never contemplated by the parties to the insurance contract nor intended by the legislature." *Cunningham v. Insurance Company of North America*, 189 S. E. 2d 832 (Va. 1972).

Alabama has stated:

> Can it be seriously contended that Seaboard expected the $4.00 premium it paid for uninsured motorist coverage on each of its 1,699 vehicles will purchase coverage for all permissive occupants of its vehicles

to the tune of $16,900,000.00? Clearly, such an expectation would not have been a reasonable one under the terms of its commercial fleet policy here in question. The status of Lambert (for purposes of uninsured motorist coverage) as an insured solely by virtue of his occupancy of the vehicle, is clearly distinguishable from the status of a named insured who is entitled to stack coverages by virtue of his personal payment of an additional premium for each vehicle insured under a multi-vehicle policy. ***Lambert v. Liberty Mutual Insurance Company***, 331 So. 2d 260, 265 (Ala. 1976).

Two Florida decisions have reached the identical result: "The defendants cannot stack uninsured motorist coverage because the vehicle in question was a commercial vehicle and covered under a commercial automobile policy. ***To rule otherwise would result in absurd consequences and would upset the commercial insurance structure as it is known . . .*** " ***Marks v. Travelers Indemnity Company***, 339 So. 2d 1120, 1126 (Fla. App. 1976).

* * *

The logic of these cases is especially compelling when the named insured is a large commercial venture. Here, fifteen vehicles were involved, while in ***Cunningham***, supra, the insured sought to stack coverage on over 4,000 vehicles. We can easily envision a situation in which stacking of coverage for an occupant would give the insurance company in return for a minimal premium a potential liability running into millions of dollars, and we do not think ***Tucker*** was ever intended to lead to that result. ***Travelers Insurance Company v. Pac.*** 337 So. 2d 397, 399 (Fla. App. 1976).

Missouri has also reached the same conclusion:

. . . if stacking were required for fleet policies there would be $14,200,000.00 of coverage for each Union Electric vehicle and the total exposure for the entire fleet of 1,420 vehicles would be 1,420 times $14,200,000.00 or $20,164,000,000.00 obviously an argument to absurdity, but the actual exposure amounts to millions of dollars. . . (If the logic for stacking personal uninsured motorist coverages were) to be followed for owners of large fleets of motor vehicles, ***there is no possible way the fleet owner could limit his uninsured motorist coverage to the statutory minimum, or if the fleet is large, to less than millions of dollars for each individual vehicle. Such a result would be unconscionable. Linderer v. Royal Globe Insurance Company,*** 597 S. W. 2d 656, 661 (Mo. App. 1980).

Most recently Washington has reached the identical result:

. . . His argument [for stacking] has no merit in this limited coverage, commercial fleet context for two reasons. First, the parties intended the policy to cover a fleet of vehicles with appropriate premium adjustments when the size of the fleet changed. The terms of the policy do not allow the premium paid for one insured highway vehicle to provide uninsured motorist insurance for the other thirty-four insured highway vehicles. Second, Darch's argument has merit only in cases like ***Milton, Raynes,*** and ***Cammel*** where additional premiums were unnecessary to protect the broadly defined "insured" in other vehicles. Here, however, additional premiums purchased additional coverage. They were necessary to provide narrowly defined 'insureds' like Darch with single coverage in other vehicles.

> Adopting Darch's argument would provide multiple uninsured motorist coverage for every permissive user of every vehicle in a commercial fleet. If each vehicle in the fleet, during the time of the policy, were in an accident with an uninsured motorist, there would be liability of 35 x 35 x $15,000.00 ($30,000.00 if more than one person involved) for uninsured motorist coverage. The average person purchasing this policy would not expect such coverage. *Ames v. Baker*, 68 N.W. 2d 713, 415 P. 2d 74 (1966).
>
> We cannot construe the policy to reach a result that would be unreasonable in light of the commercial setting in which it was written. (citing cases) *Continental Casualty Company v. Darch, et al.*, 620 P. 2d 1005, 1008 (Wash. App. 1980).

The Fifth Circuit refused to address the heretofore uniform distinction between stacking commercial fleet policy uninsured motorist coverages and personal uninsured motorist coverage. It has held that every vehicle in this 1,000 vehicle fleet has $10,000,000.00 (1,000 vehicles times $10,000.00 coverage per vehicle) of uninsured motorist benefits available on each and every vehicle in the fleet. This result is contrary to Louisiana law and violates the court obligation under the *Erie* doctrine, is contrary to every prior case from all other jurisdictions which have addressed the issue and as will be shown hereinafter the decision is unconstitutional on numerous grounds.

II.

May a United States Court of Appeals rewrite an insurance contract contrary to the intent and interest of both parties to the contract by holding that under Louisiana law the limits of uninsured motorist coverage available on each vehicle in a fleet must depend upon the number of vehicles in the fleet or does such an interpretation impair the obligations of contract, create

an unjustified discrimination against the insurer of a fleet of vehicles and violate the Equal Protection Clause and the Due Process Clause of the United States Constitution?

It is one thing to permit the stacking of uninsured motorist coverage limits under the rationale of policy interpretation in a dispute between the policyholder and the insurer as to applicable policy limits. It is quite another thing to force this result on both parties to the insuring agreement contrary to their mutual intent.

Under its policy contract, Fischbach, the policyholder, bears the first $250,000.00 of any loss! (Transcript testimony of Mr. Metcalf, Page 58; Appendix, ***infra***, p. 95; Proffer testimony of Mr. Rovin, Page 68-69, Appendix, ***infra***, pp. 97-98). Fischbach had no legal obligation to supply uninsured motorist benefits to its employees. Its sole exposure to its employees was for workman's compensation benefits which Fischbach's compensation carrier has paid. How can an employer provide uninsured motorist protection to its employees if the court blindly refuses to accept the otherwise uniform distinction between stacking of uninsured motorist coverages in a commercial fleet policy context as opposed to a family policy context? The certain answer is that such benefits will never be provided if the mutual intent of both the insurer and the policyholder are thwarted under the guise of judicial interpretation.

The Fifth Circuit panel is in error in holding that that the District Court was correct in that it "allowed the stacking of coverages on all vehicles listed on the policy." Petitioner submits that there were no vehicles "listed" on the subject policy. The policy provided coverage to "any automobile owned by the named insured." (Travelers Insurance Policy L6B; Appendix, ***infra***, pp. 99-102). Further in Endorsement 9950 (Appendix, ***infra***, p. 103) covered vehicles are described merely as "all automobiles principally garaged in all states." Nowhere

is there a "list" of covered vehicles. A listing is not necessary because the number of vehicles owned by Fischbach has no bearing on its automobile insurance permiums. The premiums are calculated solely on the basis of payroll and loss experience from prior years. (Transcript testimony of Mr. Metcalf, pages 57-58; Appendix, *infra*, pp. 95-96).

In the two cases cited by the panel in the original opinion allowing stacking, *Holmes v. Reliance Insurance Co.*, 359 So. 2d 1102 (La. App. 1978) and *Deane v. McGee*, 260 So. 2d 669 (1972) there was a ***listing*** of vehicles and ***a separate premium*** charged for each vehicle. There is no such listing of vehicles nor separate premium charges in the instant case. Fischbach wished to provide uninsured motorist benefits equal to the minimum required by the applicable laws of each state in which it had vehicles and Travelers wished to underwrite the same risk. Thwarting the common intent of both parties to the insurance agreement will effectively preclude employers from obtaining uninsured motorist benefits to protect their employees and substantially impairs the obligations of both parties to the insurance agreement. In this case the Fifth Circuit Court of Appeals has held that the owner of a fleet of vehicles cannot limit the amount of uninsured motorist coverage benefits available on each vehicle in the fleet and that "Louisiana law requires" that the amount of uninsured motorist benefits available on each vehicle depends upon the number of vehicles owned by the policyholder. There exists no valid basis which would sanction this unjustified and unconstitutional discrimination against the multiple vehicle owner.

> The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes. ***McLaughlin v. State of Florida,*** (Citations omitted) It also imposes a requirement of some rationality in the nature of the class singled out . . .

> . . . But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' (Citing cases) ***Rinaldi v. Yeager***, 384 U.S. 305, 309 (1966).

The Louisiana Uninsured Motorist Statute in effect at the time of this accident required only that, absent a specific written rejection of uninsured motorist coverage, all policies carry uninsured motorist limits equal to the minimum financial responsibility limits of the state which were $5,000 per person, $10,000.per accident. L.S.A. - R.S. 22:1406 as amended and reenacted by Act 137 of 1972; L.S.A. - R.S. 32:900.

The purpose for this requirement was to guarantee the availability of a legally stipulated minimum recovery to the injured party intended to be protected. ***Lott v. Southern Farm Bureaus Ins. Co.***, 223 So. 2d 492 (La. 1969).

To force the extent of insurance coverage required by state law to depend on the number of vehicles owned by the insured, contrary to the intent of both the insured and the insurer violates the Equal Protection Clause of the United States Constitution. If the owner of one vehicle under state law is required to maintain minimum financial responsibility coverage limits of $5,000.00 per person and $10,000.00 per accident, all vehicle owners must be equally treated. An owner of two vehicles cannot be constitutionally required to carry twice the minimum limits on each of his vehicles. Progressively, the owner of a 1,000 car fleet cannot be constitutionally required to carry $5,000,000.00 in coverage per person and $10,000,000.00 coverage per accident ***on each vehicle***!

To require the multiple vehicle owner to carry geometrically disproportionate limits on each vehicle is a denial of the equal protection clause:

. . . .the proscription of discriminatory state action is sweeping in its terms: 'No state. . . shall deny to any person within its jurisdiction the equal protection of the laws'. The clause reaches the exercise of state power, however manifested, whether exerted directly or through political subdivisions. (Citing authority). It forbids not only designed discrimination but all government action that has arbitrary impact even though the result may not originally have been intended by the governmental plan. (Citing authorities). .

If, however, arbitrary discrimination is demonstrated, the mandate of the Equal Protection Clause is applicable without regard to the manner by which the discrimination is affected. . . , *Levy v. Parker*, 346 F. Supp. 897, 901-902 (E. D. La. 1972), aff'd 411 U.S. 978 (1973).

III.

Does the United States Court of Appeals opinion in extending the application of the Louisiana Uninsured Motorist Statute beyond its stated jurisdictional limits to encompass vehicles which are outside the jurisdiction of the State of Louisiana violate the Full Faith and Credit Clause, the Due Process Clause and the Commerce Clause of the United States Constitution?

Petitioner is not contending that the Louisiana Uninsured Motorist Statute as drafted is unconstitutional. Petitioner is contending however, that the interpretation placed on the statute by the Fifth Circuit Court of Appeals renders the statute unconstitutional for the reasons previously set forth and alternatively it attempts to extend the statute beyond its drafted parameters in violation of the Full Faith and Credit Clause, the Due Process Clause, and the Commerce Clause of

the United States Constitution.

Petitioner urges that allowing 'stacking' of uninsured motorist coverage benefits to extend to vehicles which are not registered or principally garaged in the State of Louisiana is contrary to the Louisiana Uninsured Motorist Statute and violates the Full Faith and Credit Clause and the Due Process Clause of the United States Constitution:

> . . . We have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market, a 'free trade unit' in which the States' are debarred from action as separable economic entities. *H. P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525, 538, 93 L. Ed. 865, 69 S. Ct. 657, (1949). But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States - a limitation express or implicit in both the original scheme of the Constitution and the 14th Amendment. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, (1980).

The insurance policy at issue was written by Travelers, a Connecticut corporation, and issued for delivery and delivered to Fischbach, a New York corporation in the State of New York. Although the Louisiana Uninsured Motorist Statute as written specifically states that it applies only to a policy "delivered or issued for delivery in this state" L.S.A. - R.S. 22:1406 D(1) (a), the Fifth Circuit Court of Appeals has held that the

filing of the policy with the Insurance Commissioner of the State of Louisiana constitutes a constructive delivery of the policy to Louisiana. Even if the Fifth Circuit's opinion is valid on this point (which petitioner denies) the constructive delivery of the policy into Louisiana would be a constructive delivery only as it relates "to any motor vehicle registered or principally garaged in this state". L.S.A. - R.S. 22:1406 D(1).

In the instant case only sixty of the one thousand vehicles owned by Fischbach were principally garaged in Louisiana. Many of the vehicles in the commercial fleet were garaged and used principally in states whose public policy opposes the concept of stacking under any circumstances. ***Tholen v. Carney***, 555 F. 2d 479 (5th Cir. 1977); ***Talbot v. State Farm Mutual Insurance Company***, 291 So. 2d 699 (Miss. 1974); ***Arminski v. United States Fidelity and Guaranty Company***, 178 N.W. 2d 497 (Mich. App. 1970); ***Castle v. United Pacific Insurance Group***, 449 P. 2d 357 (Ore. 1968). By its very terms, the Louisiana Uninsured Motorist Statute applies only to motor vehicles "registered or principally garaged in this state." L.S.A.-R.S. 22:1406 (D) (1)

The Louisiana statute does not attempt to assert jurisdiction over a trailer on a job site in California, or a bus in Michigan. If by its terms it attempted to do so, it would clearly be unconstitutional. The opinion of the Fifth Circuit does not limit stacking to the sixty Louisiana vehicles but attempts to stack coverage for all vehicles including those which are not registered or principally garaged in Louisiana, and which in fact are never within the territorial confines of Louisiana.

Louisiana cannot constitutionally obtain "in rem" or "quasi in rem" jurisdiction over the non-Louisiana vehicles. The Court's opinion places an undue burden on interstate commerce since a policyholder engaged in interstate commerce with a fleet of vehicles is unable to limit his exposure to those vehicles "registered or principally garaged in this state." LSA - R.S.

22:1406 D(1). The interpretation of the statute by the Fifth Circuit violates the Full Faith and Credit Clause, the Due Process Clause, and the Commerce Clause of the United States Constitution.

SUMMARY

Wherefore, petitioner prays that a Writ of Certiorari issue and that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed and judgment entered herein limiting the liability of Travelers Insurance Company to the sum of $10,000.

Alternatively, petitioner prays that the judgment of the Fifth Circuit be amended to restrict the liability of Travelers Insurance Company under the judgment to the sum of $600,000 since only 60 vehicles owned by Fischbach were principally garaged in the State of Louisiana.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the following attorneys of record by placing a copy of same in the United States Mail, postage prepaid, this 15th day of September 1981:

Mr. John Paul Massicot
Counsel for Constance Fenasci, et al.
577 South Carrollton Avenue
New Orleans, Louisiana 70118

Mr. Theodore A. Mars, Jr.
Counsel for Rita Breitling Cook, et al
1220 First National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

Mr. Steven O. Medo, Jr.
Counsel for Marie T. Bannon, et al.
1220 First National Bank of Commerce Building
New Orleans, Louisiana 70112

JOHN C. COMBE, JR. of
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
18th Floor - 225 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 581-6641
Counsel for Petitioner

Appendix

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81-545

NO. _____ VOL. I

Office - Supreme Court, U.S.
FILED
SEP 28 1981
ALEXANDER L. STEVAS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TRAVELERS INSURANCE COMPANY

Petitioner

VERSUS

MRS. CONSTANCE A. FENASCI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF THOMAS J. FENASCI, AND ALSO AS NATURAL TUTRIX OF THE MINOR, GERALD P. FENASCI AND THADDEAUS FENASCI, CONSTANCE FENASCI RODRIGUEZ, MICHAEL FENASCI, THOMAS J. FENASCI, JR. AND MRS. RITA BREITLING COOK, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF DONALD EUGENE COOK, AND AS NATURAL TUTRIX OF THE MINOR, JULIE ANN COOK, AND DONNA JEAN COOK, AND MRS. MARIE T. BANNON, INDIVIDUALLY AND AS TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF JOHN A. BANNON, AND LORRAINE M. BANNON DUNCAN AND JOHN A. BANNON, JR.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

JOHN C. COMBE, JR.
Counsel for Petitioner
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
18th Floor - 225 Baronne Street
New Orleans, Louisiana 70112
(504 581 - 6641

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Minute Entry
January 2, 1979
Heebe, J.

MRS. CONSTANCE A. FENASCI, et al
VERSUS
TRAVELERS INSURANCE COMPANY

CIVIL ACTION
NO. 78-459
SECTION B

Filed: Jan 8 1979

This cause came on for hearing on a previous day on the motions of (1) plaintiff for partial summary judgment seeking to have the policy limits under the uninsured motorist coverage declared to be the same as the limits of bodily injury liability under the policy; and (2) defendant for summary judgment seeking to have the uninsured motorist limits declared to be $5,000.00 per person and $10,00.00 per accident under the policy.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of plaintiff for partial summary judgment decreeing the uninsured motorist protection to be equal to the limits of bodily injury liability under the policy, be, and the same is hereby, GRANTED.

IT IS THE FURTHER ORDER OF THE COURT that the motion of defendant for summary judgment decreeing the uninsured motorist coverage under the policy to be $5,000.00

per person and $10,000.00 per accident, be, and the same is hereby, DENIED.

REASONS

This case arises out of a Louisiana automobile collision in which Thomas J. Fenasci, Sr., Donald Eugene Cook, and John A. Bannon, three employees of Fischbach & Moore, Inc. (hereinafter Fischbach) were fatally injured while riding in a Fischbach vehicle on their way to a construction site. Two of the Fischbach employees were killed instantly, and the third died a few days later in the hospital. Plaintiffs claim that the sole cause of the collision was the negligence of Preston A. Julien, the driver of the other vehicle which struck head-on the Fischbach vehicle. On the date of the accident in suit, July 29, 1977, all Fischbach vehicles were insured under an automobile liability policy issued by Travelers Insurance Company (hereinafter Travelers), the sole defendant in this case. The survivors of the three Fischbach employees have sued Travelers under the uninsured motorist provisions of its policy. Among the numerous endorsements to the policy, the interpretation of the following and the applicability *vel non* of Louisiana law are the central concerns of these motions.

> Endorsement 7060 reads in part:
>
> "The additional premium for this endorsement is $INCL (If no premium is entered here, the additional premium for this endorsement is stated in the policy.) (The information provided for above is required to be stated above only when this endorsement is issued for attachment to the policy subsequent to its effective date.) Limits of Liability: $5,000 each person; $10,000 each accident."

Endorsement 9950, which states that it "modifies such insur-

ance as is afforded by the provisions of the policy relating to the following: UNINSURED MOTORISTS INSURANCE", and reads in pertinent part as follows:

> "It is agreed that this part applies only to the ***automobiles*** designated below: (emphasis in original)
>
> "Automobiles and State of Principal Garaging
> ALL AUTOMOBILES PRINCIPALLY GARAGED
> IN ALL STATES
>
> Limits of Liability Each person Each Accident
> $ EQUAL TO $ MINIMUM FINANCIAL RESPONSIBILITY
> LIMITS OF THE STATE WHERE THE AUTOMOBILE IS
> PRINCIPALLY GARAGED
>
> Premium
> $ SEE COMPOSITE ENDORSEMENT 8000 (2)

Plaintiffs contend that endorsement 9950 changes the policy limits of liability from $5,000/$10,000 to a sum equal to the minimum financial responsibility limits of the state where the automobile is principally garaged, in this case, Louisiana.

Defendant Travelers contends that the Louisiana law relating to uninsured motorist coverage does not apply to this policy; that its application would be unconstitutional as a denial of equal protection and due process; that even if Louisiana law did apply to this policy, it would permit the policy limits to be $5,000/$10,000; that the plaintiffs cannot "stack" the coverages supplied for each vehicle designated in the policy, and alternatively, if "stacking" is permitted, it should only be allowed on vehicles registered and/or principally garaged in Louisiana at the time of the accident.

A short review of the Louisiana Uninsured Motorist Statute, La. R. S. 22:1406(D) will be helpful at this point.

On the date of the accident in suit, La. R. S. 22:1406(D) read as follows:

> "D. The following provisions shall govern the issuance of uninsured motorist coverage in this state.
> (1) (a) No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom: provided, however, that the coverage required under this Subsection shall not be applicable where any insured named in the policy shall reject the coverage or selects lower limits. Such coverage need not be provided in or supplemental to a renewal or substitute policy where the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer.
> (b) Any insurer delivering or issuing an automobile liability insurance policy referred to herein, shall also permit the insured, at his request, to increase the coverage applicable to uninsured motor vehicles provided for herein to any amount not in excess of the limits of the automobile liability insurance carried by such insured."

As originally enacted, this statute made no mention of uninsured vehicle coverage, but beginning with the 1962 amend-

ment and up until the 1974 amendment, R. S. 22:1406 (D) required uninsured vehicle coverage " . . . in not less than the limits described in the Motor Vehicle Safety Responsibility Law of Louisiana . . ." The Motor Vehicle Safety Responsibility Law of Louisiana, R. S. 32:900, requires liability policies, with respect to each motor vehicle, to provide coverage not less than $5,000.00 per person, and $10,000.00 per accident.

With the 1974 amendment to R. S. 22:1406(D), the legislature removed all reference to the Motor Vehicle Safety Responsibility Law of Louisiana, and for the first time required the minimum limits of uninsured vehicle coverage to equal the bodily injury liability limits provided in the policy. The 1975 amendment, quoted above, did not alter the minumum requirements for uninsured vehicle coverage, but left them equal to the bodily injury limits. ***See***, Anderson v. West, 354 So. 2d 636 (La. App. 1977). However, as the court notes in ***Anderson***, the 1975 amendment provided that issuance of uninsured motorist coverage equal to the amount of bodily injury liability was not required ". . . in renewal or substituted policies where the insured had rejected or selected lower limits initially." At, 639. Defendant Travelers argues that the policy is a renewal policy and that Fischbach had selected lower limits in its previous policy with Travelers, and that therefore, the uninsured motorist coverage need not be equal to the bodily injury liability limits. The question of selection has been reserved for the jury.

The insurance policy was issued by Travelers in Hartford, Connecticut and delivered to Fischbach's insurance brokers in New York for transmittal to Fischbach at their main offices in New York. The contract was written to cover all Fischbach vehicles in all states, and provided for uninsured motorist coverage equal to the minimum limits of the state in which each vehicle is principally garaged, thus, the parties agreed to apply the laws of the various states to the contract. The con-

tract contains several endorsements for particular states requiring different terms and conditions, one of which is an endorsement entitled "UNINSURED MOTORIST INSURANCE - LOUISIANA AMENDMENT", which provides that the term "uninsured highway vehicle" as used in the policy, includes underinsured highway vehicles. The policy was filed with the Insurance Commissioner's Office of the State of Louisiana.

While La. R. S. 22:1406 (D) applies only to policies ". . . delivered or issued for delivery . . ." in Louisiana, the policy in question here was in fact delivered to Louisiana. *See*, deposition of Mr. Jackson, at 85-86. Additionally, this court finds that its filing with the Louisiana Insurance Commissioner's Office constitutes a "delivery" to Louisiana. It should be noted, however, that long-standing Louisiana jurisprudence on the issue of "delivery" of insurance policies, would find a "constructive delivery" to Louisiana from the intention of the parties in providing that uninsured motorist coverage in the policy includes underinsured motorist coverage, a uniquely Louisianian provision. In stating that the uninsured motorist coverage for all vehicles in all states be equal to the minimum limits of each respective state, the parties clearly intended that the laws of all states would be applied to claims under the policy. *See*, Pruitt v. Great Southern Life Insurance Company, 12 So. 2d 261 (La. 1942), for a discussion of the definition of "constructive delivery".

Alternatively, the Court finds that Louisiana has a stronger interest in applying its own law to this controversy than does any other state, since it involves the deaths of Louisiana residents on Louisiana highways, and the claims of their Louisiana survivors under an insurance policy issued to cover, *inter alia*, vehicles principally garaged in Louisiana. Deane v. McGee, 260 So. 2d 669 (La. 1972) (concurring opinion by Tate, J., at 672); Graham v. American Casualty, 259 So. 2d 22 (La. 1972); and Sutton v. Langley, 330 So. 2d 231 (La. App. 1976). Having determined that Louisiana law applies to the interpre-

tation of this insurance policy to the controversy at bar, the Court finds no constitutional prohibitions preventing this result. Clay v. Sun Insurance Office, Ltd, 363 U.S. 207 (1960); and Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954).

Defendant argues that contrary to the prevailing jurisprudential rule in Louisiana, plaintiffs should not be permitted to stack the uninsured motorist coverages provided in the Travelers policy. A review of the cases dealing with stacking uninsured motorist coverages in Louisiana, reveals that all attempts to prevent stacking by insurers have been declared null and void as against public policy. Barbin v. United States Fidelity & Guaranty Co., 315 So. 2d. 754 (La. 1975); Deane v. McGee, ***supra***; Graham v. American Casualty, ***supra***; Holmes v. Reliance Insurance Co., 359 So. 2d 102 (La. App. 1978); Anderson v. West, 354 So. 2d 636 (La. App. 1977), writs denied at 356 So. 2d 1387 and 356 So. 2d 1013 (La. 1978); and Wilkinson v. Fireman's Fund Insurance Co., 298 So. 2d 915, 918 (La. App. 1974), writs refused, 309 So. 2d 657 (La. 1974). Also ***see***, Ward, ***Uninsured Motorist Coverage in Louisiana***, 24 Loy. L. Rev. 85, 102 (1978). However, since the application of the Louisiana Uninsured Motorist Statute is limited by its own terms to ". . . vehicles registered or principally garaged in this State. . .", the Court likewise limits the vehicles available for stacking to those under the policy which are principally garaged in Louisiana; and in no event, may stacking exceed the actual extent of damages. Deane v. McGee, ***supra***; and Graham v. American Casualty Co., ***supra***.

Accordingly, for the reasons stated above, the motion of plaintiffs for partial summary judgment declaring the policy limits under the uninsured motorist coverage equal to the amount of bodily injury liability limits is granted, and the motion of defendant for summary judgment limiting the uninsured coverage available under the policy to $5,000/$10,000 is denied, with the understanding that a jury deter-

mination that Fischbach selected lower limits would remove the requirement that the uninsured motorist coverage equal the bodily injury liability limits, but would not alter this Court's ruling on the stacking issue.

/s/ FREDERICK J. HEEBE

Minute Entry
August 3, 1979
Heebe, J.

MRS. CONSTANCE A. FENASCI, et al.
versus
TRAVELERS INSURANCE COMPANY

CIVIL ACTION
NO. 78-459
SECTION B

Filed Aug. 6, 1979

This case involves a Louisiana automobile collision which fatally injured Thomas J. Fenasci, Sr., Donald Eugene Cook, and John A. Bannon, three employees of Fischbach & Moore, Inc., while they were traveling to a construction site in a vehicle owned by their employer. At the time of the accident, July 29, 1977, all Fischbach & Moore vehicles nationwide were covered by an automobile liability policy issued by defendant Travelers Insurance Company. Plaintiffs bring this suit under the uninsured motorist provisions of that policy.

The matter was tried partly to a jury and partly to the Court, resulting in a directed verdict in plaintiffs' favor on the uninsured/underinsured status of the driver of the other vehicle and a jury verdict in favor of the various plaintiffs on the negligence issue.

The parties had stipulated that the plaintiffs' decedents were insureds under the terms of the Travelers policy; that Fischbach & Moore, Inc., owned at least 1,000 vehicles nationwide on July 29, 1977, and that sixty of those vehicles were registered and/or principally garaged in Louisiana.

Prior to trial, on January 2, 1979, this Court ruled that

under the 1975 amendment to the Louisiana Uninsured Motorist Statute, La. R. S. 22:1406(D), (the law in force on April 1, 1977, the effective date of the Travelers policy), the uninsured motorist coverage provided in the policy was equal to the bodily injury liability limits, i. e., $1,000,000.00, ***unless*** the jury determined that Fischbach & Moore, Inc., had selected lower limits of uninsured motorist coverage in its prior policy with Travelers Insurance Company.

At the time of that ruling, the issue of selection, *i.e.*, whether or not Fischbach & Moore, in connection with its prior policy with Travelers, had selected uninsured motorist coverage limits lower than its bodily injury liability limits, had been reserved for the jury. However, all parties subsequently agreed to withdraw the selection issue from the jury's consideration.

In addition to the selection issue, this Court also has before it: 1) the motion of defendant Travelers Insurance Company for reconsideration of our ruling permitting "stacking" the uninsured motorist coverage provided on all Fischbach & Moore vehicles registered or principally garaged in Louisiana; 2) the motion of plaintiffs for reconsideration of our ruling limiting "stacking" to Fischbach & Moore vehicles registered and/or principally garaged in Louisiana; and 3) the motion of Employers National Insurance Company for reconsideration of our prior ruling dismissing its intervention for compensation benefits paid to plaintiffs.

Considering the evidence adduced at trial, and in light of the arguments of counsel, legal memoranda and proposed findings of fact and conclusions of law submitted by the parties, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Prior to April 1, 1974, Alexander and Alexander, a national insurance brokerage firm, acting as agent for Fischbach & Moore in procuring insurance coverage, requested Travelers Insurance Company, ***inter alios***, to issue bids offering to underwrite specific coverages set forth in its proposal.

2. In connection therewith, Alexander and Alexander provided Travelers Insurance Company a copy of an automobile insurance policy issued by Royal Globe Insurance Company to Natkin and Company, a wholly owned subsidiary of Fischbach & Moore.

3. Alexander and Alexander specifically requested that Travelers Insurance Company write an automobile insurance policy effective April 1, 1974, which conformed to the coverages provided in the Royal Globe policy.

4. Thereafter, Travelers Insurance Company issued a comprehensive automobile liability policy to Fischbach & Moore with an effective policy period of April 1, 1974, to April 1, 1977. This first policy stated that it provided uninsured motorist coverage limits "equal to minimum financial responsibility limits of the state in which the vehicle is principally garaged."

5. Prior to the expiration date of the above policy, Fischbach & Moore, Inc., through its authorized agent, Alexander and Alexander, again requested the issuance of bids from the insurance industry and, finding the bid submitted by Travelers Insurance Company to be the most desirable, requested Travelers to duplicate the coverage provided in the expiring policy.

6. Thereafter, Travelers issued to Fischbach & Moore, Inc., policy No. TR-NSA-114T829-9-77 which had an effective policy period from April 1, 1977, to April 1, 1978. It was this

second policy which was in effect on July 29, 1977, on the date of the accident in suit.

7. In Endorsement 9950 of the second policy, the limits of uninsured motorist coverage were listed as "equal to nimimum financial responsibility limits of the state where the automobile is principally garaged."

8. By requesting $1,000,000 coverage for bodily injury liability and the minimum amount of uninsured motorist coverage required by each of the states in 1974, when the minimum uninsured motorist coverage available in Louisiana was $5,000/$10,000, Fischbach & Moore selected lower limits for uninsured motorist coverage than its bodily injury liability in its first Travelers policy.

CONCLUSIONS OF LAW

1. On April 1, 1974, the effective date of the first Travelers policy, the Louisiana Uninsured Motorist Statute, La. R. S. 22:1406(D), as amended in 1972, read as follows:

> "D. (1) (a) No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits described in the Motor Vehicle Safety Responsibility Law of Louisiana, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators.
>
> Of uninsured or underinsured motor vehicles because of bodily injury, sickness or disease, including death,

resulting therefrom; provided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage.

(b) Any insurer delivering or issuing an automobile liability insurance policy referred to herein, shall also permit the insured, at his request, to increase the coverage applicable to uninsured motor vehicles provided for herein to any amount not in excess of the limits of the automobile liability insurance carried by such insured."

2. At that time and up until the present, the Motor Vehicle Safety Responsibility Law of Louisiana, La. R. S. 32:851, *et seq.*, at §900 (B) (2) required that automobile insurance policies insure

> ". . . the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out ot the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, ***with respect to each such motor vehicle, as follows: five thousand dollars because of bodily injury to or death of one person in any one accident and***, subject to said limit for one person, ***ten thousand dollars because of bodily injury to or death of two or more persons in any one accident,*** and one thousand dollars because of injury to or destruction of property of others in any one accident." (emphasis added)

3. Thus, under Louisiana law applicable to the first Trav-

elers policy, the minimum financial responsibility limits of this state were $5,000 per person and $10,000 per accident. Accordingly, the first policy provided bodily injury liability limits of $1,000,000 and uninsured motorist coverage of $5,000/$10,000 per vehicle.

4. On April 1, 1977, the effective date of the second Travelers policy, the Louisiana Uninsured Motorist Statute, *supra*, as amended in 1975 provided:

> "D. The following provisions shall govern the issuance of uninsured motorist coverage in this state.
> (1) (a) No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom: provided, however, that the coverage required under this Subsection shall not be applicable where any insured named in the policy shall reject the coverage or selects lower limits. ***Such coverage need not be provided in or supplemental to a renewal or substitute policy where the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer.***
> (b) Any insurer delivering or issuing an automobile liability insurance policy referred to herein, shall also permit the insured, at his request, to increase the

coverage applicable to uninsured motor vehicles provided for herein to any amount not in excess of the limits of the automobile liability insurance carried by such insured." (emphasis added)

5. With respect to the last sentence of La. R. S. 22:1406 (D) (1) (a), as amended in 1975, the term "renewal" is defined in La. R. S. 22:636.1 (a) (5) as:

> "[T]he issuance and delivery by an insurer of a policy replacing at the end of the policy period a policy previously issued and delivered by the same insurer, or the issuance and delivery of a certificate of notice extending the term of a policy beyond its policy period or term; provided, however, that any policy with a policy period or term of less than six months shall for the purpose of this chapter be considered as if written for a policy or term of six months. In addition, any policy written for a term longer than one year or any policy with no fixed expiration date, shall for the purpose of this chapter, be considered as if written for successive policy periods or terms of one year, and such policy may be terminated at the expiration of any annual period upon giving twenty days notice of cancellation prior to such anniversary date, and such concellation shall not be subject to any other provisions of this chapter."

6. Based on the above statutory definition, we conclude that the second Travelers policy covering all Fischbach & Moore vehicles on the date of the accident in suit is a renewal or substitute policy as contemplated by the last sentence of the 1975 amendment to §1406 (D) (1) (a).

7. Hence, considering our finding that Fischbach & Moore had selected lower limits of uninsured motorist coverage than bodily injury liability coverage in its first policy, along with our determination that the second policy was a renewal or

substitute policy, we reach the conclusion that under the express terms of the 1975 enactment of §1406 Travelers was not required to provide Fischbach & Moore with uninsured motorist coverage in limits equal to its bodily injury liability limits. Myers v. Thibeaux, 365 So. 2d 266 (La. App. 3rd Cir. 1978), *rehearing denied* Nov. 28, 1978.

8. Accordingly, we conclude that the second policy provided Fischbach & Moore, Inc., with uninsured motorist coverage in the same limits as the previous policy, *i. e.*, $5,000/$10,000 per vehicle.

9. Plaintiffs strenously argue that no selection of lower limits of uninsured motorist coverage in the first Travelers policy was possible since prior to the 1974 amendment to §1406 (the first to provide for selection of lower limits), there was no provision in the law allowing for selection of lower limits. To follow this line of argument would rob the 1975 amendment of all effectiveness with respect to renewals of initial policies issued before the 1974 amendment because at that time no insured would have been able to select lower limits. This would result in the automatic increase of uninsured motorist coverage to the bodily injury liability coverage and would require insurance companies to provide uninsured motorist coverage for which no adequate premium had been charged. *See*, Ward, *Uninsured Motorist Coverage in Louisiana*, 24. Loy. L. Rev. 85, 90-91 (1978).

10. To rule as plaintiffs request would impair the obligations of the insurance contract by imposing a more onerous obligation on the insurer than either party to the contract contemplated or agreed upon when the second policy was first issued, and render the 1975 amendment to §1406 unconstitutional both under Article 1, section 10 of the United States Constitution which provides that "No State shall . . . pass any Law impairing the Obligation of Contracts . . ." and under Article 1, section 23 of the Louisiana Constitution

of 1974, which provides that "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted." O'Banion v. Allstate Insurance Co., 347 So. 2d 878, 880 (La. App. 3rd Cir. 1977).

11. For reasons stated on p. 5 of this Court's minute entry of January 2, 1979, wherein we determined that plaintiffs were allowed to stack uninsured motorist coverages on the Fischbach & Moore vehicles registered and/or principally garaged in Louisiana, we decline to reconsider our ruling on the availability of stacking coverages on more than one vehicle.

12. Upon reconsideration of our prior ruling limiting stacking to Fischbach & Moore vehicles registered or principally garaged in Louisiana, we now conclude that plaintiffs are entitled to stack the $10,000 per accident uninsured motorist coverage for all vehicles insured under the Travelers policy. In so doing, we note that numerous Louisiana decisions have stacked coverages on vehicles neither registered nor principally garaged within the State of Louisiana. Crim v. Thorning, Civil Action No. 74-2969-H (E. D. La. August 10, 1978); Holmes v. Reliance Insurance Company, 359 So. 2d 1102 (La. App. 3rd Cir. 1978), ***writ denied*** 362 So. 2d 1120; Deane v. Mc Gee, 260 So. 2d 669 (La. 1972).

13. For reasons stated in this Court's original order of January 2, 1979, dismissing the intervention of Employers National Insurance Company, and considering that the Louisiana Supreme Court has since denied writs in Gentry v. Pugh at 363 So. 2d 922 (La. App. 1978), we decline to reconsider our dismissal of the intervention.

For the above stated reasons,

IT IS THE ORDER OF THE COURT that the motion of defendant Travelers Insurance Company for reconsideration of this Court's ruling permitting stacking the uninsured motorist

coverage provided Fischbach & Moore vehicles registered or principally garaged in Louisiana, be, and the same is hereby, DENIED.

IT IS THE FURTHER ORDER OF THE COURT that the motion of plaintiffs for reconsideration of our ruling limiting stacking to Fischbach & Moore vehicles registered or principally garaged in Louisiana, be, and the same is hereby, GRANTED.

IT IS THE FURTHER ORDER OF THE COURT that the motion of Employers National Insurance Company for reconsideration of our prior ruling dismissing its intervention for compensation benefits paid to plaintiffs, be, and the same is hereby, DENIED.

Let judgment be entered accordingly.

/s/ FREDERICK J. HEEBE

WEST KEY NUMBER SYSTEM

Mrs. Constance A. Fenasci et al.,
Plaintiffs-Appellees Cross
Appellants,

Employers National Insurance Co.,
Intervenor-Appellee Cross Appellant,

v.

TRAVELERS INSURANCE COMPANY,
Defendant-Appellant
Cross Appellee.

No. 79-3703

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

April 17, 1981.

Rehearing and Rehearing En Banc
Denied June 18, 1981.
See 648 F. 2d 446.

Diversity action was brought against employer's automobile insurer by survivors of employees who were killed in a collision that occurred while they were riding to work in their employer's truck. The United States District Court for the Eastern District of Louisiana, Fred J. R. Heebe, J., entered judgment in favor of the survivors, and both the employer's automobile insurer and the survivors appealed. The Court of Appeals held that: (1) district court applying Louisiana law did not

abuse its discretion in not allowing evidence of net income during trial of the damages issue; (2) district court properly determined that employer's initial automobile policy provided $5,000/$10,000 uninsured motorist coverage and that the policy in effect on the date of the accident was a renewed policy carrying over such limits; and (3) district court properly found that the automobile policy was in fact delivered in Louisiana and, therefore, properly applied Louisiana law to allow the stacking of coverage on all vehicles listed on the policy

Affirmed.

1. Interest Key 47(1)

Under Louisiana law, plaintiffs who recovered under the uninsured motorist coverage of automobile policy were entitled to interest on the judgment from the date of judicial demand. LSA-R.S. 13:4203.

2. Damages Key 96

Under Louisiana law, trial judge is to be granted wide discretion in determining the quantum of damages.

3. Damages Key 100

Under Louisiana law, trial court awarding loss of future wages has the option of using gross income, net income, or any figure in between that was reported on the victim's last tax return as a representation of a statement of wages.

4. Death Key 60

In diversity action brought against employer's automobile insurer by survivors of employees who were killed in a collision that occurred while they were riding to work in their employer's truck, district court applying Louisiana law did not abuse its discretion in not allowing evidence of net income during trial of the damages issue.

5. Insurance Key 145.1

In diversity action brought against employer's automobile insurer by survivors of employees who were killed in a collision that occurred while they were riding to work in their employer's truck, district court properly determined that employer's initial automobile policy provided $5,000/$10,000 uninsured motorist coverage and that the policy in effect on the date of the accident was a renewed policy carrying over such limits. LSA-R.S. 22:1406, 32:900.

6. Workers' Compensation Key 2251

Under Louisiana law, workers compensation insurer was not entitled to reimbursement from uninsured motorist insurer for amounts paid and to be paid by it to survivors of employees who were killed in a collision that occurred while they were riding to work in their employer's truck. LSA-R.S. 23:1101, 23:1103.

7. Insurance Key 147(2), 155

In diversity action brought against employer's automobile insurer by survivors of employees who were killed in a collision that occurred while they were riding to work in their employer's truck, district court properly found that the automobile policy in question was in fact delivered in Louisiana and, therefore, properly applied Louisiana law to allow the stacking of coverage on all vehicles listed on the policy. LSA-R.S. 22:1406.

8. Insurance Key 147(2)

Insurer's filing of policy with Louisiana Insurance Commissioner's Office constituted a delivery of the policy in Louisiana and, therefore, Louisiana law was applicable to determine whether stacking of coverage on all vehicles listed on the policy would be permitted. LSA-R.S. 22:1406.

9. Insurance Key 147(2)

Intention of the parties in providing that policy included

uninsured motorist coverage supported a finding of "constructive delivery" of the policy in Louisiana such that Louisiana law was applicable to determine whether stacking of coverage on all vehicles listed on the policy would be permitted. LSA-R.S. 22:1406.

Jones, Walker, Waechter, Poitevent, Carrere & Denegre, John C. Combe, Jr., New Orleans, La., for defendant-appellant cross-appellee.

John Paul Massicot, New Orleans, La., for Constance A. Fenasci, et al.

Young & Mars, W. W. Young, III, Theodore A. Mars, Jr., New Orleans, La., for Rita Breitling Cook, et al.

Monroe & Lemann, Steven O. Medo, Jr., New Orleans, La. for Marie T. Bannon, et al.

Lemle, Kelleher, Kohlmeyer & Matthews, Albert H. Hanemann, Jr., New Orleans, La., for Employers National Ins. Co.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before BROWN, POLITZ and TATE, Circuit Judges.

PER CURIAM:

This action arose out of an automobile accident in which three employees of Fischbach and Moore, Incorporated (F & M), Thomas J. Fenasci, John A. Bannon and Donald Eugene Cook riding in a pick-up truck owned by F & M, were killed on their way to work in a collision between the truck and a vehicle operated by Preston A. Julien. Their survivors (Fenasci

et al.) brought this diversity action in Federal District Court against Travelers Insurance Company (Travelers) which insured F & M. 1/

The jury found that the sole and proximate cause of the accident was the negligence of Preston A. Julien, who had only $10,000 of public liability insurance. Because F & M had uninsured motorist coverage under its policy with Travelers, the insurance company was held liable for the entire verdict of $1,400,000.

This appeal presents multiple issues, all of which are carefully and exhaustively briefed by able counsel. We shall address each in turn.

I. Interest From Date of Judicial Demand

Included in its final judgment, the District Court awarded interest from the date of judicial demand, relying on LSA-R. S. 13:4203 which provides:

> Interest on judgments from judicial demand in ex delicto cases
>
> > Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, "ex delicto", which may be rendered by any of the courts.

Travelers contend in their cross appeal that this was erroneous because its liability arose out of an insurance contract, not a tort, and §4203 is inapplicable. The Fenascis argue that nevertheless, Travelers is bound to pay the damages of a tortfeasor and the liability is "ex delicto."

1/ Counsel for the parties stipulated F & M is a foreign corporation organized and existing under the laws of the State of New York with its principal place of business being located in New York City, New York.

[1] The District Court thought that Travelers' was the more logical position but nonetheless awarded interest, feeling bound by Louisiana cases in which interest was awarded against uninsured motorist carriers. ***Butler v. MFA Mutual Insurance Co.***, 356 So. 2d 1129 (La. App. 2d Cir. 1978); ***Williams v. State Farm Mutual Automobile Insurance Co.***, 349 So. 2d 1275 (La. App. 1st Cir. 1977); ***Bourgeois v. Government Employees Insurance Co.***, 316 So. 2d 804 (La. App. 1st Cir. 1975); ***Shirley v. Aetna Casualty & Surety Co.***, 256 So. 2d 462 (La. App. 2d Cir. 1972). In doing so, the District Court was correct. The ***Erie*** doctrine compels Federal Courts to follow state law. ***In re Hoover***, 447 F. 2d 195, 198 (5th Cir. 1971).

II. Testimony As To Gross Income Only

During trial, counsel for Travelers was ordered by District Court not to cross-examine Fenascis' economic experts, nor to obtain any direct testimony from its economic experts bearing on the issue of loss of economic support to the survivors on a net or after tax basis. Only gross income figures were allowed to reach the jury.

Travelers suggests District Court erred because the jury was prevented from making a decision as to whether it should consider gross wages or net wages in determining the award for economic loss. To support this position, Travelers cites ***Norfolk & Western R. R. Co., v. Liepelt***, 444 U.S. 940, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980), which held it was reversible error for the trial court to exclude evidence of income taxes payable on the decedent's parts and estimated future earnings. 444 U.S. at 493-99, 100 S. Ct. at 757-60, 62 L. Ed. 2d at 693-97.

[2-4] The Fenascis correctly point out, however, ***Liepelt*** was an action under the FELA and strictly limited in application to federal law, whereas, in this case we are dealing with state law and are bound under ***Erie*** to apply it. It is well

settled in Louisiana the trial judge is to be granted wide discretion in determining the quantum of damages. See, *e.g.*, *Brummerloh v. Firemen's Insurance Co.*, 377 So. 2d 1301 (La. App. 1979); *Clofort v. Matmoor, Inc.*, 370 So. 2d 1305 (La. App. 1979). When awarding the loss of future wages, the trial court has the option of using gross income, net income, or any figure in between that was reported on the victim's last tax return as a representation of his statement of wages. *Morgan v. Liberty Mutual Insurance Co.*, 323 So. 2d 855, 863 (La. App. 1975). See also *Roundtree v. Technical Welding & Fabrication Co.*, 364 So. 2d 1325, 1335 (La. App. 1978). "Because tax liability varies with the individual and is altered with changing circumstances, in some cases it is more appropriate to project lost earnings on a figure near the gross income." *Morgan*, 323 So. 2d at 862. We therefore cannot conclude District Court abused its discretion in not allowing evidence of net income during trial of the damages issue in this case.

III. F & M's Choice of Limits

District Court concluded F & M had selected uninsured motorist protection in limits lower than the bodily injury liability protection afforded by the policy, and concluded this particular Travelers' policy provided $5,000/$10,000 uninsured motorist protection. In reaching this decision, District Court found Travelers was initially solicited by Alexander and Alexander, the national insurance brokerage firm acting as agent for F & M in procuring insurance coverage, to submit a bid to underwrite the same risks F & M's then existing manuscript with Hartford Insurance Company provided. After Travelers bound the coverage, Alexander and Alexander submitted to Travelers a copy of the standard form automobile liability policy issued by Royal Globe Insurance Company to Natkin and Company, a wholly owned subsidiary of F & M. Thereafter, Travelers issued a comprehensive automobile liability policy to F & M with an effective policy period of April 1,

1974, to April 1, 1977 which extended coverage limits "equal to minimum financial responsibility limits of the state in which the vehicle is principally garaged." Travelers subsequently renewed this policy which had an effective policy period from April 1, 1977, to April 1, 1978. It was this second policy which was in effect on July 29, 1977, the date of the accident.

At the time the April 1974 policy was written, the Louisiana Uninsured Motorist Statute, L.S.A. -R. S. 22:1406, as amended and re-enacted by Act 137 of 1972, required uninsured motorist coverage be provided "[i]n not less than the limits described in the Motor Vehicle Safety Responsibility Law of Louisiana . . . ." *Id.* The minimum financial responsibility limit of the State of Louisiana in April 1974 was (and still is to this day) $5,000 per person and $10,000 per accident. Louisiana Motor Vehicle Safety Responsibility Law, L. S. A.-R. S. 32:900. District Court consequently construed the language in F & M's policy to be a selection of $5,000 per person/$10,000 per occurrence of uninsured motorist coverage in Louisiana.

The Fenascis' cross-appeal alleging the testimony at trial was replete, explicit, uncontradicted, and unequivocal F & M wanted the Hartford policy duplicated. To support this assertion, the Fenascis cite extensive portions of the trial transcript, contending R. S. 22:1406 did not provide for uninsured motorist protection "in limits equal to the minimum financial responsibility limits" of this state for the simple reason Louisiana did not have a statute that demanded insurance coverage or the posting of a cash bond after an accident has occurred. Accordingly, they argue the Travelers' policy effective April 1, 1977, provided uninsured motorist protection in the limits of $1,000,000.

In response, Travelers submits the Fenascis' argument totally overlooks the "savings clause" or "grandfather clause" contained in the statute:

> . . . *Such coverage need not be provided in or supplemental to a renewal or substitute policy where the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer.* (emphasis added) La. R.S. 22:1406 as re-enacted and amended by Act 494 of 1975.

Travelers further argues the policy issued in April 1977 was a renewal policy and the named insured had previously selected lower limits which would be carried over to it, asserting the 1972 Uninsured Motorist Statute only required the insurer to offer limits of $5,000/$10,000 to an insured and Act 137 of 1972 gave the insured the right to request an increase in uninsured motorist limits.

[5] In reviewing these contentions, District Court's findings of fact will not be set aside unless clearly erroneous. F. R. Civ. P. 52(a). We find they are not. In Endorsement 9950 of the second policy, the limits of uninsured motorist coverage were listed as "equal to minimum financial responsibility limits of the state where the automobile is principally garaged." During 1974 and up until the present, the Motor Vehicle Safety Responsibility Law of Louisiana, L.S.A.- R. S. 32:851 *et seq.*, §900 (B) (2) required automobile policies insure

> . . . the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, *with respect to each such motor vehicle, as follows: five thousand dollars because of*

> *bodily injury to or death of one person in any one accident and,* subject to said limit for one person, *ten thousand dollars because of bodily injury to or death of two or more persons in any one accident,* and one thousand dollars because of injury to or destruction of property of others in any one accident. (emphasis added)

District Court thus properly determined under Louisiana law applicable to the first Travelers' policy, the minimum financial responsibility limits in effect were $5,000 per person and $10,000 per accident.

With respect to the second Travelers policy covering all F & M vehicles on the date of the accident in suit, the 1975 amendment to §1406 (D) (1) (a) provided:

> D. The following provisions shall govern the issuance of uninsured motorist coverage in this state. (1)(a) No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom: provided, however, that the coverage required under this Subsection shall not be applicable where any insured named in the policy shall reject the coverage or selects lower limits. *Such coverage need not be provided in or supplemental to a renewal or substitute policy where the named insured has re-*

jected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer. (Emphasis included by trial court)

(b) Any insurer delivering or issuing an automobile liability insurance policy referred to herein, shall also permit the insured, at his request, to increase the coverage applicable to uninsured motor vehicles provided for herein to any amount not in excess of the limits of the automobile liability insurance carried by such insured. (emphasis added.)

Based on this last sentence, we conclude whether F & M was trying to recreate the Royal Globe or the Hartford policy when it began doing business with Travelers is irrelevant because in either case, District Court properly determined the policy in effect at the time of the accident was a renewed policy, under which they could keep the lower limit, despite the 1974 and 1975 amendments to L.S.A. - R. S. 22:1406(D).

IV. Reimbursement of Workmen's Compensation Insurer

At the time of the fatal accident, Employers National Insurance Company (Employers) was the workmen's compensation insurer of F & M. It paid all medical and burial expenses incurred by the deceased employees and has paid and continues to pay weekly benefits to their survivors. When the survivors of the three decedents filed this suit against Travelers seeking to recover the damages caused by the uninsured motorist, Employers intervened in the suit, seeking reimbursement for the amounts paid and to be paid by it to the survivors under the Louisiana Workmen's Compensation Act. After trial resulted in a jury verdict in favor of the Fenascis, District Court dismissed Employers' intervention, citing *Gentry v. Pugh*, 362 So. 2d 1154 (La. App. 1978), which held the uninsured motorist carrier was not a third person from whom the workmen's compensation insurer was entitled to recover under L.S.A.-

R.S. 23:1101-1103 2/ the amount it had paid in compensation to the employer who was injured by a third-party tortfeasor. *Gentry*, 362 So. 2d at 1156.

Employers argues R. S. 23:1101 gives a clear and unmistakable right to the employer (or his insurer) to seek reimbursement from a third person who is liable to the injured employee in damages and District Court erred in not enforcing its right. To hold otherwise, Employers contends, would be to grant a windfall double recovery to the injured employee (or his survivors) and to impose on the person liable for the damages exposure to liability for more damages than he caused. Since *Gentry* is not a decision of the highest court of Louisiana, Employers asserts this Court is not bound under *Erie* to follow it, especially when the decision is suspect.

2/ Section 1101 provides:

"When an injury . . . for which compensation is payable . . . has occurred under circumstances creating in . . . [a] third person . . . a legal liability to pay damages . . . the aforesaid employee . . . may claim compensation . . . and the . . . award of compensation hereunder shall not affect the claim or right of action of the said employee . . . against such third person . . .

"Any person having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit against such third person to recover any amount which he has paid or become obligated to pay as compensation to such employee . . ."

Section 1102 requires that the person bringing the suit under 1101, whether the employee or the employer, give written notice of the suit to the other to facilitate intervention. Section 1103 generally provides that the employer's claim for reimbursement of compensation shall take precedence over the employee's claim " . . . if the damages are not sufficient" to satisfy the claims of both.
Gentry, 362 So. 2d at 1156.

Travelers points out, however, Employers neglects that the policy explicitly states:

> Exclusions: This policy does not apply
>
> * * * * * *
>
> *(c) so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier* or any person or organization qualifying as a self-insurer under any workmen's compensation or disability benefits law or any similar law. (Emphasis added.)

Moreover, Travelers submits this Court should affirm District Court's application of *Gentry*, as any other result would give Employers a benefit for which it had not bargained. paid or contracted.

[6] Since this case was docketed with this Court, the Louisiana Fourth Circuit has decided *Bannon v. Edrington*, 392 So. 2d 186 (La. App. 1980), which is dispositive of the issue before us. In *Bannon*, the Louisiana Fourth Circuit Court of Appeals reaffirmed the Second Circuit's Position in *Gentry*, holding the compensation payer has no claim under R. S. 23: 1103 for recovery against an uninsured motorist insurer. The Louisiana Appellate Court reasoned (i) damages are due for breach of a duty, and an uninsured motorist carrier is not liable for breaching any duty, and (ii) the liability of the insurer is a "contractual liability," not a "legal liability" within R.S. 23:1101. *Bannon*, 392 So. 2d at 187. In light of such holdings we cannot find District Court erred.

V. Stacking

[7-9] District Court applied the Louisiana Uninsured Motorist Statute, L.S.A.- R. S. 22:1406 to permit "stacking"

of the insurance policies by the Fenascis. Travelers argues the Louisiana legislature intended R. S. 22:1406 be limited to those policies "delivered or issued for delivery" in Louisiana, that the instant policy was not "delivered" in Louisiana and that therefore Louisiana law does not apply. The Fenascis correctly point out and District Court properly found, however, the policy in question was in fact delivered in Louisiana. We also agree with District Court's conclusion Travelers' filing of the policy with the Louisiana Insurance Commissioner's Office constitutes a "delivery" in Louisiana and that long-standing Louisiana jurisprudence on the issue of "delivery" of insurance policies supports a finding of "constructive delivery" in Louisiana from the intention of the parties in providing that the policy includes uninsured motorist coverage. 3/ Moreover, in the alternative, we find Louisiana has a stronger interest in applying its own law to this controversy than does any other state since it involves the deaths of Louisiana residents on Louisiana highways, and the claims of their Louisiana survivors under an insurance policy issued to cover, *inter alia*, vehicles principally garaged in Louisiana. *Deane v. Mc Gee*, 261 La. 686, 260 So. 2d 669 (1972) (concurring opinion by Tate, J., 260 So. 2d at 672); *Graham v. American Causalty*, 261 La. 85, 259 So. 2d 22 (1972). *Sutton v. Langley*, 330 So. 2d 321 (La. App. 1976).

The District Court allowed the stacking of coverage on all vehicles listed on the policy. In doing so the trial judge sought to apply the law of Louisiana as reflected in various decisions, including *Deane, supra,* and *Holmes v. Reliance Ins. Co.*, 359 So. 2d 1102 (La. App. 1978). We have carefully reviewed the authorities cited by the parties and we find that the District Court properly evaluated and applied the then prevailing Louisiana law. We are persuaded of the correctness of the District Court's conclusions.

The District Court is AFFIRMED.

3/ *See Pruitt v. Great Southern Life Insurance Co.*, 202 La. 527, 12 So. 2d 261 (La. 1942), for a discussion of the definition of "constructive delivery."

Mrs. Constance A. FENASCI et al.,
Plaintiffs-Appellees-Cross
Appellants,

Employers National Insurance Co.,
Intervenor-Appellee-Cross
Appellant,

TRAVELERS INSURANCE COMPANY,
Defendant-Appellant-Cross
Appellee.

No. 79-3703.

United States Court of Appeals, Fifth Circuit.
Unit A

June 18, 1981.

Appeals from the United States District Court for the Eastern District of Louisiana; Frederick J. R. Heebe, Chief Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 17, 1981, 5 Cir. 1981, 642 F. 2d 986)

Before BROWN, POLITZ and TATE, Circuit Judges.

PER CURIAM:

Appellant contends that in deciding the "stacking"issue adverse to it our decision, *inter alia*, ignores dispositive Louisiana jurisprudence, particularly the intermediate appellate court decision in *Briley v. Falati*, 367 So. 2d 1227 (La. App. 1979). We disagree. In this diversity case we are to apply the law of Louisiana. We conclude the decision relied on by the district

court, ***Holmes v. Reliance Ins. Co.***, 359 So. 2d 1102 (La. App. 1978), is controlling Louisiana law, more consistent with the rationale of decisions by the Louisiana Supreme Court, such as its decision in ***Deane v. Mc Gee***, 261 La. 686, 260 So. 2d 669 (1972) which we cited. We do not agree that the decision in ***Briley v. Falati*** requires that we reject the trial court's allowance of "stacking" of uninsured motorist coverage.

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts - West Publishing Company,

29TH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. JOHN THE BAPTIST
STATE OF LOUISIANA
DIVISION "B"

NO. 9437

Filed: May 26, 1978

MRS. CONSTANCE A. FENASCI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF THOMAS J. FENASCI, AND ALSO AS NATURAL TUTRIX OF THE MINOR, GERARD P. FENASCI, AND THADDEAUS FENASCI, CONSTANCE FENASCI RODRIGUEZ, MICHAEL FENASCI, AND THOMAS J. FENASCI, JR.

versus

RICHARD L. EDRINGTON, ADMINISTRATOR OF THE SUCCESSION OF PRESTON A. JULIEN, INTEGON GENERAL INSURANCE COMPANY, AND STATE FARM INSURANCE COMPANY

FILED: /s/ Audrey Holmes
DEPUTY CLERK

PETITION FOR DAMAGES

The Joint petition of:

Mrs. Constance A. Fenasci, individually, and as administratrix of the estate of Thomas J. Fenasci and also as natural tutrix of the minor, Gerard P. Fenasci; and Thaddeaus Fenasci, Constance Fenasci Rodriguez, Michael Fenasci, and Thomas J. Fenasci, Jr., all residents of and domiciled in the Parish of Jefferson, State of Louisiana;

I.

That defendant, Richard L. Edrington, is the duly appointed legal representative in the succession of Preston A. Julien who formerly resided at Route 1, Box 98, Edgard, Louisiana.

II.

That defendant, Integon General Insurance Company of Winston-Salem, North Carolina, referred to hereinafter simply as Integon, is a foreign insurer authorized to do and is doing business in the State of Louisiana.

III.

That defendant, State Farm Insurance Company, is a foreign insurer authorized to do and is doing business in the State of Louisiana.

IV.

That defendants, Richard L. Edrington as administrator and legal representative of the succession of the late Preston A. Julien, Integon and State Farm Insurance Company are justly and truly indebted to your petitioners for the hereinafter enumerated amounts for the following reasons to-wit:

V.

That on or about the 29th day of July, 1977, decedents Thomas J. Fenasci, Sr., Donald Eugene Cook, and John A. Bannon, all employees of Fischbach and Moore, Inc., were occupants of a 1976 GMC pickup truck, which vehicle was owned by Fischbach and Moore, Inc., and were travelling in the Parish of St. Charles, Louisiana, headed toward Taft, Louisiana, the site of a construction job at which Fischbach and Moore, Inc., was performing electrical contracting; that

decedent, John A. Bannon, was driving the pickup truck and decedents, Thomas J. Fenasci, Sr. and Donald Eugene Cook were riding as guest passengers, that at all times relevant hereto decedents were using and/or occupying the above described vehicle with the permission, knowledge, and consent of Fischbach and Moore, Inc., who actually supplied said vehicle to the decedents for their use, in connection with their employment.

VI.

That at approximately 6:35 a.m. on July 29, 1977, the afore-described vehicle was proceeding in a northerly direction on Louisiana Highway 3127, approaching Luling, Louisiana; that said vehicle was struck by a 1977 Ford Granada automobile, owned and being operated by Preston A. Julien who was proceeding on the same Highway in a southerly direction.

VII.

That as a result of the collision, Thomas J. Fenasci, Sr., Donald Eugene Cook, and John A. Bannon all received fatal injuries as did Preston A. Julien.

VIII.

That the proximate and legal cause of the accident herein sued upon was the negligence of Preston A. Julien in the following particulars, to-wit:

a) Travelling at an excessive rate of speed;

b) Operating his vehicle in a careless and wanton manner;

c) Improperly passing;

d) Improperly changing lanes;

e) Operating his vehicle in the wrong lane of traffic;

f) Failing to act as a reasonable and prudent person under similar circumstances;

g) Violating the Revised Statutes of the State of Louisiana and the Parochial Ordinances of the Parish of St. Charles all of which are specifically pleaded herein as if same were copied in extenso; and

h) Swerving into the oncoming lane of traffic occupied by Bannon at a point and place in time that made the collision inevitable.

IX.

That defendant, Integon, had issued a policy of public liability insurance to Preston A. Julien insuring him for the consequences of his negligent actions while driving.

X.

That defendant, State Farm Insurance Company, had issued a policy for public liability insurance to decedent, Thomas J. Fenasci, Sr., insuring one or more vehicles which he owned; that in accordance with the Revised Statutes of the State of Louisiana, this policy of public liability insurance included protection for uninsured motorists and/or underinsured motorists and also provided medical payments with funeral coverage.

XI.

That petitioners aver that Preston A. Julien was an uninsured and/or underinsured motorist as envisioned under the provisions of the Louisiana Revised Statutes.

XII.

That petitioners have made demand upon defendant, State Farm Insurance Company, for the balance of benefits under contract of insurance issued; that State Farm Insurance Company has refused to make payments under this policy and has refused to live up to its contractual obligations; that petitioners aver that such refusal is arbitrary and capricious, and entitled your petitioners to recover, in addition to all contractual benefits, statutory penalties, attorneys' fees, interest and costs.

XIII.

That as a result of the accident herein sued upon petitioners suffered the following, to-wit:

(1) Constance A. Fenasci, individually, and as administratrix of the estate of Thomas J. Fenasci, and as natural tutrix of the minor, Gerard P. Fenasci, and Thaddeaus Fenasci, Constance Fenasci Rodriguez, Michael Fenasci, and Thomas J. Fenasci, Jr. :

Mental and physical pain and suffering experienced by Thomas J. Fenasci upon realizing that a serious injury was imminent

$300,000.00

Mental and physical pain and suffering experienced by Thomas J. Fenasci as a result of the injuries sustained in the collision

300,000.00

Loss of support for Constance A. Fenasci and loss of wages

600,000.00

Loss of pension benefits

300,000.00

Mental and physical pain and suffering, grief and. anguish as a result of the death of her husband

300,000.00

Loss of love and affection experienced by Constance A. Fenasci as a result of the death of her husband

300,000.00

Funeral expenses

1,500.00

Loss of support for the minor, Gerard P. Fenasci

100,000.00

Loss of nurture and guidance experienced by the minor, Gerard P. Fenasci

75,000.00

Loss of love and affection experienced by the minor, Gerard P. Fenasci, as a result of the death of his father

200,000.00

Loss of love and affection for the death of their father and mental pain and suffering:

Thaddeaus Fenasci

200,000.00

Constance Fenasci Rodriguez

200,000.00

Michael Fenasci

200,000.00

Thomas J. Fenasci, Jr.

200,000.00

TOTAL

$3,276,500.00

XIV.

That Mrs. Constance A. Fenasci appears herein in her legal capacity by virtue of letters testamentary issued by the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, a copy of which is annexed hereto and made part hereof.

XV.

That Thomas J. Fenasci, was married twice; first, unto Gladys Newsham, from whom he was divorced many years ago; that of this marriage only one child was ever born, namely, your petitioner Thomas J. Fenasci, Jr.; that Thomas J. Fenasci was married secondly unto your petitioner, Constance A. Fenasci, with whom he was living and residing at the time of his death; that of this union only the following children were ever born; namely, your petitioners, Gerard P. Fenasci, Thaddeaus Fenasci, Constance Fenasci Rodriguez, and Michael Fenasci; that no other children were born to decedent, Thomas J. Fenasci, in any status whatsoever, and that he never adopted anyone.

XVI.

The petitioners aver demand upon Richard L. Edrington as Administrator and legal representative of the Succession of Preston A. Julien as required under the Louisiana Code of Civil Procedure, Article 3241 et seq.

WHEREFORE, Petitioners, Mrs. Constance A. Fenasci, individually and as administratrix of the estate of Thomas J. Fenasci, and also as natural tutrix of the minor, Gerard P. Fenasci, and Thaddeaus Fenasci, Constance Fenasci Rodriguez,

Michael Fenasci, and Thomas J. Fenasci, Jr., pray that defendants be duly cited to appear and answer this petition, that they be served with a copy of same, and that after legal delays and due proceedings had they be rendered a judgment herein in favor of petitioners and against defendants, Richard L. Edrington, Administrator of the Succession of Preston A. Julien, Integon General Insurance Company, and State Farm Insurance Company in the full and true sum of THREE MILLION TWO HUNDRED SEVENTY-SIX FIVE HUNDRED AND NO/100 ($3,276,500.00) DOLLARS, together with interest from date of judicial demand, all costs, statutory penalties, and attorneys' fees.

Respectfully submitted,

/s/ JOHN PAUL MASSICOT
JOHN PAUL MASSICOT
Attorney for Petitioners
237 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-1222

PLEASE SERVE DEFENDANTS:

Mr. Richard L. Edrington
Carville and Edrington
P.O. Drawer 460
Laplace, Louisiana 70068

Integon General Insurance Company
of Winston-Salem, North Carolina
through the Secretary of State

State Farm Insurance Company
through the Secretary of State

A TRUE COPY
/s/ Harold L. Montegut
clerk of court
29th Judicial Dist. Court
Parish of St. John The
Baptist, La.

CERTIFICATE OF CLERK, IN ACCORDANCE WITH THE LAWS OF THE UNITED STATES

UNITED STATES OF AMERICA

STATE OF LOUISIANA
29th JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST

I, HAROLD L. MONTEGUT, Clerk of the 29th Judicial District Court for the Parish of St. John the Baptist.

DO HEREBY CERTIFY, That the certified copy of the petition for damages
in the matter entitled: MRS. CONSTANCE A. FENASCI, ET Al VS. RICHARD L. EDRINGTON, ADMINISTRATOR OF THE SUCCESSION OF PRESTON A. JULIEN, INTEGO GENERAL INSURANCE COMPANY, AND STATE FARM INSURANCE COMPANY

Docket Number 9437, of the 29th Judicial District Court in and for the Parish of St. John the Baptist, State of Louisiana, is a true and correct copy of the original on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this said Court, at the Town of Edgard, on this 27th day of December, in the year of our Lord, one thousand nine hundred and seventy-eight (1978) and in the two hundred third (203rd.) year of the Independence of the United States of America.

/s/ Harold L. Montegut
Clerk of Court

I, Thomas J. Malik, Judge of Division B of the 29th Judicial District Court for the Parish of St. John the Baptist, DO HEREBY CERTIFY THAT HAROLD L. MONTEGUT, is the Clerk of said Court, that the same is a Court of Record having civil jurisdiction, and that the signature, HAROLD L. MONTEGUT, Clerk, to the foregoing certificate is in the proper handwriting of him, the said HAROLD L. MONTEGUT, Clerk; to his official act as such, full faith and credit are due and owing; and I DO FURTHER CERTIFY That his attestation is in due form of law.

Given under my hand, at the town of Edgard, on the 27th day of December, in the year of our Lord one thousand nine hundred seventy-eight (1978).

/s/ Thomas J. Malik
JUDGE

I, HAROLD L. MONTEGUT, Clerk of the 29th Judicial District Court in and for the Parish of St. John the Baptist, DO HEREBY CERTIFY that Thomas J. Malik whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of Division B of the 29th Judicial District Court for the Parish of St. John the Baptist, duly appointed and commissioned and qualified as such, and that said attestation is in due form of law.

WITNESS my hand and the seal of said Court, this 27th day of December, in the year of our Lord one thousand nine hundred seventy-eight (1978)

/s/ Harold L. Montegut
Clerk of Court

29TH JUDICIAL DISTRICT COURT FOR THE PARISH OF
ST. JOHN THE BAPTIST
STATE OF LOUISIANA
DIVISION "B"

NO. 9330

Filed: April 7, 1978

MARIE T. BANNON, ET ALS

V.

RICHARD L. EDRINGTON, ADMINISTRATOR OF THE SUCCESSION OF PRESTON A. JULIEN, INTEGON GENERAL INSURANCE COMPANY AND AIU INSURANCE COMPANY, FORMERLY AMERICAN INTERNATIONAL INSURANCE COMPANY

FILED: /s/ Audrey Holmes
DEPUTY CLERK

PETITION FOR DAMAGES

Mrs. Marie T. Bannon, individually, and as Testamentary Executrix of the Succession of John Albert Bannon, and Lorraine M. Bannon Duncan and John A. Bannon, Jr., all of the full age of majority and residents of and domiciled in the Parish of Jefferson, State of Louisiana, with respect represent:

I.

That defendant Richard L. Edrington is the duly appointed legal representative in the succession of Preston A. Julien who formerly resided at Route 1, Box 98, Edgard, Louisiana.

II.

That defendant, Integon General Insurance Company of Winston-Salem, North Carolina, referred to hereinafter simply as Integon, is a foreign insurer authorized to do and is doing business in the State of Louisiana.

III.

That defendant, AIU Insurance Company, formerly American International Insurance Company, is a foreign insurer authorized to do and is doing business in the State of Louisiana.

IV.

That defendants Richard L. Edrington as administrator and legal representative of the succession of the late Preston A. Julien, Integon and AIU Insurance Company are justly and truly indebted to your petitioners for the hereinafter enumerated amounts for the following reasons to-wit:

V.

That on or about the 29th day of July, 1977, decedents Thomas J. Fenasci, Sr., Donald Eugene Cook, and John A. Bannon, all employees of Fischbach and Moore, Inc., were occupants of a 1976 GMC pickup truck, which vehicle was owned by Fischbach and Moore, Inc., and were traveling in the Parish of St. Charles, Louisiana, headed toward Taft, Louisiana, the site of a construction job at which Fischbach and Moore, Inc., was performing electrical contracting; that decedent John A. Bannon was driving the pickup truck and decedents Thomas J. Fenasci, Sr. and Donald Eugene Cook were riding as guest passengers, that at all times relevant hereto decedents were using and/or occupying the above described vehicle with the permission, knowledge, and consent of Fisch-

bach and Moore, Inc., who actually supplied said vehicle to the decedents for their use, in connection with their employment.

VI.

That at approximately 6:35 a.m. on July 29, 1977, the afore-described vehicle was proceeding in a northerly direction on Louisiana Highway 3127, approaching Luling, Louisiana; that said vehicle was struck by a 1977 Ford Granada automobile owned and being operated by Preston A. Julien who was proceeding on the same Highway in a southerly direction.

VII.

That as a result of the collision, Thomas J. Fenasci, Sr., Donald Eugene Cook, and John A. Bannon all received fatal injuries as did Preston A. Julien.

VIII.

That the proximate and legal cause of the accident herein sued upon was the negligence of Preston A. Julien in the following particulars, to-wit:

a) Traveling at an excessive rate of speed;

b) Operating his vehicle in a careless and wanton manner;

c) Improperly passing;
d) Improperly changing lanes;

e) Operating his vehicle in the wrong lane of traffic;

f) Failing to act as a reasonable and prudent person under similar circumstances; and

g) Violating the revised Statutes of the State of Louisiana and the Parochial Ordinances of the Parish of St. Charles all of which are specifically pleaded herein as if same were copied in extenso.

h) Swerving into the oncoming lane of traffic occupied by Bannon at a point and place in time that made the collision inevitable.

IX.

That defendant, Integon, had issued a policy of public liability insurance to Preston A. Julien insuring him for the consequences of his negligent actions while driving.

X.

That defendant, AIU Insurance Company, had issued a policy for public liability insurance to decedent, John A. Bannon, insuring three (3) vehicles which he owned; that in accordance with the Revised Statutes of the State of Louisiana, this policy of public liability insurance included protection for uninsured motorists and/or underinsured motorists and also provided medical payments with funeral coverage.

XI.

That petitioners aver that Preston A. Julien was an uninsured and/or underinsured motorist as envisioned under the provisions of the Louisiana Revised Statutes.

XII.

That petitioners have made demand upon defendant, AIU Insurance Company, for the balance of benefits under contract of insurance issued; that AIU Insurance Company has refused to make payments under this policy and has refused to live

up to its contractual obligations; that petitioners aver that such refusal is arbitrary and capricious, and entitles your petitioners to recover, in addition to all contractual benefits, statutory penalties, attorneys' fees, interest and costs.

XIII.

That as a result of the accident herein sued upon petitioners suffered the following to-wit:

Marie T. Bannon, individually, and as testamentary executrix of the Succession of John A. Bannon, and Lorraine M. Bannon Duncan, and John A. Bannon, Jr. :

Mental and physical pain and suffering experienced by John A. Bannon upon realizing that a serious injury was imminent

$300,000.00

Mental and physical pain and suffering experienced by John A. Bannon as a result of the injuries sustained in the collision

300,000.00

Loss of support for Marie T. Bannon and loss of wages

600,000.00

Loss of pension benefits

300,000.00

Mental and physical pain and suffering, grief and anguish as a result of the death of her husband

300,000.00

Loss of love and affection experienced by Marie T. Bannon as a result of the death of her husband

300,000.00

Loss of love and affection as a result of the death of their father and mental pain and suffering:

Lorraine M. Bannon Duncan

200,000.00

John A. Bannon, Jr.

200,000.00

TOTAL

$2,500,000.00

XIV.

That Mrs. Marie T. Bannon appears herein in her legal capacity by virtue of letters testamentary issued by the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, a copy of which is annexed hereto and made part hereof.

XV.

That John A. Bannon was married but once and then unto petitioner Marie T. Bannon, with whom he was living and residing at the time of his death; that of this union only the following children were ever born, namely your petitioners, Lorraine M. Bannon Duncan and John A. Bannon, Jr. that no other children were ever born to decedent, John A. Bannon, in any status whatsoever, and that he never adopted anyone.

XVI.

The petitioners aver demand upon Richard L. Edrington as Administrator and legal representative of the Succession of Preston A. Julien as required under the Louisiana Code of Civil Procedure Article 3241 et seq.

Appendix

2

NO. 81-545 VOL. II

Office - Supreme Court, U.S.
FILED
SEP 16 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TRAVELERS INSURANCE COMPANY

Petitioner

VERSUS

MRS. CONSTANCE A. FENASCI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF THOMAS J. FENASCI, AND ALSO AS NATURAL TUTRIX OF THE MINOR, GERALD P. FENASCI AND THADDEAUS FENASCI, CONSTANCE FENASCI RODRIGUEZ, MICHAEL FENASCI, THOMAS J. FENASCI, JR. AND MRS. RITA BREITLING COOK, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF DONALD EUGENE COOK, AND AS NATURAL TUTRIX OF THE MINOR, JULIE ANN COOK, AND DONNA JEAN COOK, AND MRS. MARIE T. BANNON, INDIVIDUALLY AND AS TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF JOHN A. BANNON, AND LORRAINE M. BANNON DUNCAN AND JOHN A. BANNON, JR.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

JOHN C. COMBE, JR.
Counsel for Petitioner
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
18th Floor - 225 Baronne Street
New Orleans, Louisiana 70112
(504 581 - 6641

WHEREFORE, Petitioners pray that defendants be duly cited to appear and answer this petition, that they be served with a copy of same, and that after legal delays and due proceedings had they be rendered a judgment herein in favor of petitioners, Mrs. Marie T. Bannon, individually and as Testamentary Executrix of the Succession of John Albert Bannon, and Lorraine M. Bannon Duncan and John A. Bannon, Jr. and against defendants, Richard L. Edrington, Administrator of the Successsion of Preston A. Julien, Integon General Insurance Company, and AIU Insurance Company in the full and true sum of TWO MILLION, FIVE HUNDRED THOUSand AND NO/100 ($2,500,000.00) DOLLARS, together with interest from date of judicial demand and for all costs.

MONROE & LEMANN
Steven O. Medo, Jr.

By: /s/ Steven O. Medo, Jr.
1424 Whitney Building
New Orleans, Louisiana 70130
Telephone: 504-586-1900

Attorneys for Petitioners

PLEASE SERVE DEFENDANTS:

Mr. Richard L. Edrington
Carville and Edrington
P.O. Drawer 460
Laplace, Louisiana 70068

Integon General Insurance Company of Winston-Salem,
North Carolina through the Secretary of State

AIU Insurance Company through the Secretary of State.

CERTIFICATE OF CLERK, IN ACCORDANCE WITH THE LAWS OF THE UNITED STATES

UNITED STATES OF AMERICA
STATE OF LOUISIANA
29TH JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST

I, HAROLD L. MONTEGUT, Clerk of the 29th Judicial District Court for the Parish of St. John the Baptist.

DO HEREBY CERTIFY, That the certified copy of the petition for damages

in the matter entitled: MARIE T. BANNON, ET ALS VS. RICHARD L. EDRINGTON, ADMINISTRATOR OF THE SUCCESSION OF PRESTON A. JULIEN, INTEGON GENERAL INSURANCE CO. & AIU INSURANCE CO., FORMERLY AMERICAN INTERNATIONAL INSURANCE CO

Docket Number 9330, of the 29th Judicial District Court in and for the Parish of St. John the Baptist, State of Louisiana, is a true and correct copy of the original on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this said Court, at the Town of Edgard, on this 27th day of December, in the year of our Lord, one thousand nine hundred and seventy-eight (1978) and in the two hundred third (203rd.) year of the Independence of the United States of America.

/s/ Harold L. Montegut
Clerk Of Court

I, Thomas J. Malik, Judge of Division B of the 29th Judicial District Court for the Parish of St. John the Baptist, DO HEREBY CERTIFY THAT HAROLD L. MONTEGUT, is the Clerk of said Court, that the same is a Court of Record having civil jurisdiction, and that the signature, HAROLD L. MONTEGUT, Clerk, to the foregoing certificate is in the proper handwriting of him, the said HAROLD L. MONTEGUT, Clerk; to his official act as such, full faith and credit are due and owing; and I DO FURTHER CERTIFY That his attestation is in due form of law.

Given under my hand, at the town of Edgard, on the 27th day of December, in the year of our Lord one thousand nine hundred seventy-eight (1978).

/s/ Thomas J. Malik
JUDGE

I, HAROLD L. MONTEGUT, Clerk of the 29th Judicial District Court in and for the Parish of St. John the Baptist, DO HEREBY CERTIFY that Thomas J. Malik whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of Division B of the 29th Judicial District Court for the Parish of St. John the Baptist, duly appointed and commissioned and qualified as such, and that said attestation is in due form of law.

WITNESS my hand and the seal of said Court, this 27th day of December, in the year of our Lord one thousand nine hundred seventy-eight (1978)

/s/ Harold L. Montegut
Clerk of Court

29TH JUDICIAL DISTRICT COURT FOR THE PARISH
OF ST. JOHN THE BAPTIST
STATE OF LOUISIANA
DIVISION "A"

NO. 9312
Filed: April 3, 1978

RITA BREITLING COOK, et al

v.

INTEGON GENERAL INSURANCE COMPANY OF
WINSTON-SALEM, NORTH CAROLINA, et al

FILED: /s/ Audrey Holmes
DEPUTY CLERK

PETITION FOR DAMAGES

Mrs. Rita Breitling Cook, individually, and as administratrix of the estate of Donald Eugene Cook, and as natural tutrix of the minor, Julie Ann Cook, and Donna Jean Cook, residents of and domiciled in the Parish of Jefferson, State of Louisiana, with respect represents:

I.

That defendant, Richard L. Edrington, is the

duly appointed legal representative in the estate of Preston A. Julien who formerly resided at Route 1, Box 98, Edgard, Louisiana.

II.

That defendant, Integon General Insurance Company of Winston-Salem, North Carolina, referred to hereinafter simply

as Integon, is a foreign insurer authorized to do and is doing business in the State of Louisiana.

III.

That defendant, Liberty Mutual Insurance Company, is a foreign insurer authorized to do and is doing business in the State of Louisiana.

IV.

That defendant, Richard L. Edrington,

as administrator and legal representative of the estate of the late Preston A. Julien, Integon and Liberty Mutual Insurance Company are justly and truly indebted to your petitioners for the hereinafter enumerated amounts for the following reasons to-wit:

V.

That on or about the 29th day of July, 1977, decedents Thomas J. Fenasci, Sr., Donald Eugene Cook, and John A. Bannon, all employees of Fischbach and Moore, Inc., were occupants of a 1976 GMC pickup truck, which vehicle was owned by Fischbach and Moore, Inc., and were traveling in the Parish of St. Charles, Louisiana, headed toward Taft, Louisiand, the site of a construction job at which Fischbach and Moore, Inc., was performing electrical contracting; that decedent John A. Bannon was driving the pickup truck and decedents Thomas J. Fenasci, Sr. and Donald Eugene Cook were riding as guest passengers; that at all times relevant hereto decedents were using and/or occupying the above described vehicle with the permission knowledge and consent of Fischbach and Moore, Inc., who actually supplied said vehicle to the decedents for their use, in connection with their employment.

VI.

That at approximately 6:35 a.m. on July 29, 1977, the aforedescribed vehicle was proceeding in a northerly direction on Louisiana Highway 3127, approaching Luling, Louisiana; that said vehicle was struck by a 1977 Ford Granada automobile owned and being operated by Preston A. Julien who was proceeding on the same Highway in a southerly direction.

VII.

That as a result of the collision, Thomas J. Fenasci, Sr., Donald Eugene Cook, and John A. Bannon all received fatal injuries as did Preston A. Julien.

VIII.

That the proximate and legal cause of the accident herein sued upon was the negligence of Preston A. Julien in the following particulars, to-wit:

a) Traveling at an excessive rate of speed;

b) Operating his vehicle in a careless and wanton manner;

c) Improperly passing

d) Improperly changing lanes;

e) Operating his vehicle in the wrong lane of traffic;

f) Failing to act as a reasonable and prudent person under similar circumstances; and

g) Violating the revised Statutes of the State of Louisiana

and the Parochial Ordinances of the Parish of St. Charles, all of which are specifically pleaded herein as if same were copied in extenso.

IX.

That defendant, Integon, had issued a policy of public liability insurance to Preston A. Julien insuring him for the consequences of his negligent actions while driving.

X.

That defendant, Liberty Mutual Insurance Company, had issued a policy for public liability insurance to decedent, Donald Eugene Cook, insuring two (2) vehicles which he owned; that in accordance with the Revised Statutes of the State of Louisiana, this policy of public liability insurance included protection for uninsured motorists and/or underinsured motorists.

XI.

That petitioners aver that Preston A. Julien was an uninsured and/or underinsured motorist as envisioned under the provisions of the Louisiana Revised Statutes.

XII.

That petitioners have made demand upon defendant, Liberty Mutual Insurance Company, for the balance of benefits under the contract of insurance issued; that Liberty Mutual Insurance Company has refused to make payments under this policy and has refused to live up to its contractual obligations; that petitioners aver that such refusal is arbitrary and capricious, and entitles your petitioners to recover, in addition to all contractual benefits, statutory penalties, attorneys' fees, interest

and costs.

XIII.

That as a result of the accident herein sued upon petitioners suffered the following, to-wit:

1. Mental and physical pain and suffering experienced by Donald Eugene Cook upon realizing that a serious injury was imminent

$300,000.00

2. Mental and physical pain and suffering experienced by Donald Eugene Cook as a result of the injuries sustained in the collision

300,000.00

3. Loss of support for Rita Breitling Cook and loss of wages

600,000.00

4. Loss of pension benefits

300,000.00

5. Mental and physical pain and suffering, grief and anguish as a result of the death of her husband

300,000.00

6. Loss of love and affection experienced by Rita Breitling Cook as a result of the death of her husband

300,000.00

7. Funeral expenses

1,500.00

8. Loss of support for the minor Julie Ann Cook
100,000.00

9 Loss of nurture and guidance experienced by the minor Julie Ann Cook
75,000.00

10. Loss of love and affection experienced by the minor Julie Ann Cook as a result of the death of her father
200,000.00

11. Loss of love and affection experienced by Donna Jean Cook as a result of the death of her father and mental pain and suffering
200,000.00

TOTAL
$2,676,500.00

XIV.

That Mrs. Rita Breitling Cook appears herein in her legal capacities by virtue of letters of administration and tutorship issued by the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, copies of which are annexed hereto and made part hereof.

XV.

That Donald Eugene Cook was married but once and then unto petitioner Rita Breitling, with whom he was living and residing at the time of his death; that of this union only the following children were ever born, namely your petitioners, Julie Ann Cook and Donna Jean Cook; that no other children were born to decedent, Donald Eugene Cook, in any status whatsoever, and that he never adopted anyone.

XVI.

That petitioners aver demand upon Richard L. Edrington as Administrator and legal representative of the estate of Preston A. Julien as is required under the Louisiana Code of Civil Procedure Article 3241 et seq.

WHEREFORE, petitioners pray that defendants be duly cited to appear and answer this petition, that it be served with a copy of same, and that after legal delays and due proceedings had there be rendered a judgment herein in favor of petitioners, Mrs. Rita Breitling Cook, individually, and as Administratrix of the estate of Donald Eugene Cook, and as natural tutrix of the minor, Julie Ann Cook, and Donna Jean Cook, and against defendants, Integon General Insurance Company of Winston-Salem, North Carolina, Liberty Mutual Insurance Company, and Richard L. Edrington as Administrator and legal representative of the estate of Preston A. Julien, in the full and true sum of TWO MILLION SIX HUNDRED SEVENTY-SIX THOUSAND FIVE HUNDRED AND NO/100 ($2,676,500.00) DOLLARS, together with interest from date of judicial demand, and for all costs.

YOUNG AND MARS
Attorneys for Petitioners
311 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 581-7326

BY: /s/ Theodore A. Mars, Jr.
Theodore A. Mars, Jr.

PLEASE SERVE DEFENDANTS:

Mr. Richard L. Edrington
Carville and Edrington
Post Office Drawer 460
LaPlace, Louisiana 70068

Integon General Insurance Company of
Winston-Salem, North Carolina through
the Secretary of State

Liberty Mutual Insurance Company through
the Secretary of State

A TRUE COPY

Harold L. Montegut
Clerk of Court
29th Judicial Dist Court
Parish of St. John the Baptist, La.

CERTIFICATE OF CLERK, IN ACCORDANCE WITH THE LAWS OF THE UNITED STATES

UNITED STATES OF AMERICA
STATE OF LOUISIANA
29TH JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST

I, HAROLD L. MONTEGUT, Clerk of the 29th Judicial District Court for the Parish of St. John the Baptist.

DO HEREBY CERTIFY, That the certified copy of the petition for damages
in the matter entitled: RITA BREITLING COOK, ET AL VS. INTEGON GENERAL INSURANCE COMPANY OF WINSTON-SALEM, NORTH CAROLINA, ET AL Docket Number 9312, of the 29th Judicial District Court in and for the Parish of St. John the Baptist, State of Louisiana, is a true and correct copy of the original on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this said Court, at the Town of Edgard, on this 27th day of December, in the year of our Lord, one thousand nine hundred and seventy-eight (1978) and in the two hundred third (203rd) year of the Independence of the United States of America.

/s/ Harold L. Montegut
Clerk of Court

I, Thomas J. Malik, Judge of Division B of the 29th Judicial District Court for the Parish of St. John the Baptist, DO HEREBY CERTIFY THAT HAROLD L. MONTEGUT, is the Clerk of said Court, that the same is a Court of Record having civil jurisdiction, and that the signature, HAROLD L. MONTEGUT, Clerk, to the foregoing certificate is in the proper handwriting of him, the said HAROLD L. MONTEGUT, Clerk; to his official act as such, full faith and credit are due and owing; and I DO FURTHER CERTIFY That his attestation is in due form of law.

Given under my hand, at the town of Edgard, on the 27th day of December, in the year of our Lord one thousand nine hundred seventy-eight (1978).

/s/ Thomas J. Malik
JUDGE.

I, HAROLD L. MONTEGUT, Clerk of the 29th Judicial District Court in and for the Parish of St. John the Baptist, DO HEREBY CERTIFY that Thomas J. Malik whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of Division B of the 29th Judicial District Court for the Parish of St. John the Baptist, duly appointed and commissioned and qualified as such, and that said attestation is in due form of law.

WITNESS my hand and the seal of said Court, this 27th day of December, in the year of our Lord one thousand nine hundred seventy-eight (1978)

/s/ Harold L. Montegut
Clerk of Court

Edward A. BRILEY
v.
Frank S. FALATI et al.
No. 9972

Court of Appeal of Louisiana,
Fourth Circuit

Jan. 23, 1979.

Rehearing Denied March 14, 1979.

Motorist sued, inter alia, insurer that issued a policy to the lessor of the vehicle that the motorist was driving at the time he was injured in an automobile collision. The 24th Judicial District Court, Parish of Jefferson, Division "A" Louis G. Desonier, J., entered summary judgment for the insurer and motorist appealed. The Court of Appeal, Beer, J., held that the motorist was not entitled to stack the separate uninsured motorist coverages on the 66 vehicles included on the multi-vehicles policy issued to the lessor.

Affirmed.

Lemmon, J., concurred and assigned reasons.

Insurance Key 531.3(2)

Lessee of vehicle was not entitled to stack separate uninsured motorist coverages on 66 vehicles included on multi-vehicle policy issued to lessor. LSA-R.S. 22;1406, 22:1406, subd. D(2)(b).

Olivier & Brinkhaus, Armand J. Brinkhaus, Sunset, for plaintiff-Appellant.

Bruce J. Borrello, Metairie, for defendants-appellees.
Before LEMMON, BOUTALL and BEER, JJ.
Beer, Judge.

Edward A. Briley was injured in an automobile collision involving the 1974 Ford which he had leased through Bordelon Leasing, Inc. and the 1970 Chevrolet of Frank S. Falati. He filed suit for damages in the amount of $1,350,000 against Falati, Aetna Causalty (Falati's auto liability insurer), Travelers Insurance Company (his own uninsured motorist insurer), and Liberty Mutual Insurance Company, who had issued a combination basic automobile policy - including uninsured motorist coverage - to Ford Motor Company, the owner of the 1974 Ford leased by Briley.

Travelers and Liberty Mutual separately moved for summary judgment, each contending that Aetna provided liability coverage in an amount which exceeded the uninsured motorist coverage of their respective policies. 1/

The trial court granted summary judgment in favor of Travelers, relying upon *Doucet v. Insurance Company of North America*, 302 So.2d 731 (La. App. 3rd Cir. 1974), and also granted summary judgment in favor of Liberty Mutual, notwithstanding Briley's contention that the multi-vehicle aspect of that policy provided coverage greater than Aetna's liability limits.

The accident occurred on July 9, 1974, prior to the effective date 2/ of the 1974 amendment to LSA-R. S. 22:1406 D (2)(b) entitled in part "Uninsured Motorist Coverage."

1/ It is uncontroverted that Aetna's policy limit is $50,000; that Travelers' is $5,000; and that Liberty Mutual's per car limit is $5,000.

2/ August 1, 1974.

Thus, the applicable statutory authority dealing with the issue of whether Falati is an uninsured (or, more precisely, underinsured) motorist is LSA-R. S. 22:1406 (1972), since the 1974 amendment is not retroactive. ***Doucet***, supra; accord, ***Butler v. MFA Mutual Insurance Company***, 356 So. 2d 1129 (La. App. 2nd Cir. 1978); ***Fontenot v. Guillory***, 327 So. 2d 578 (La. App. 3rd Cir. 1976). The 1972 statute provides that an "uninsured motor vehicle" is "an insured motor vehicle when the automobile liability insurance coverage on such vehicle ***is less than the uninsured motorist coverage carried by the insured.***" (Emphasis ours.)

Even so, Briley's able counsel further contends that Briley is entitled to cumulate, or stack, the separate uninsured motorist coverages (5,000/10,000, each) on the 66 vehicles included on Liberty Mutual's multivehicle policy issued to Ford, the owner of the leased vehicle. However, we believe his reliance upon ***Barbin v. United States Fidelity & Guaranty Company***, 315 So. 2d 754 (La. 1975), to support this contention is misplaced. ***Barbin*** states that:

> "* * * (T)he clear intent of ***Graham [v. American Casualty Co. of Reading, Penn.***, 261 La. 85, 259 So. 2d 22], ***Deane***, and the other cited cases is to the effect that if a plaintiff is issued insurance on two or more automobiles, ***pays premiums*** for two or more different uninsured motorist coverages, and sustains damages thereunder in excess of the mandatory minimal coverage, ***he*** can 'stack' coverages and recover his damages. . . .
> This intent should not be circumvented merely because separate vehicle coverages are placed in one policy, rather than in multiple policies." (Emphasis added.)

Against the background of who paid the premium for the uninsured motorist coverage, the able trial judge relied upon the rationale of ***Lambert v. Liberty Mutual Insurance Company***,

331 So. 2d 260 (Ala. 1976), even though it is not a Louisiana case. In *Lambert*, an employee of the named insured-employer sought to stack uninsured motorist coverages on multiple vehicles insured under one policy purchased by his employer. The court reasoned that the status of a permissive user of an insured vehicle was distinguishable from the named insurer "who is entitled to stack coverages by virtue of his personal payment of an additional premium for each vehicle insured under a multi-vehicle policy." The *Lambert* court cited *Cunningham v. Ins. Co. of North America*, 213 Va. 72, 189 S. E. 2d 832 (1972), which recognized that the privilege of stacking is afforded a "named insured" in exchange for his additional premium, observing:

> "The named insured in a policy receives coverage, and a contract benefit, for which he has paid a consideration. He seeks indemnity based on the payment of that premium and where he has paid separate premiums he is entitled to the additional coverages. However, this argument and reasoning does not apply to a permissive user of a vehicle . . . ." *Cunningham*, 189 S. E. 2d at 836.

The generally accepted rationale that ambiguities in insuring agreements are to be resolved against the drafting party (invariably, the insurance company) does not affect the issue here. What is at issue is the extent to which an underwriting agreement, or agreements, should be subjected to "interpretation" in order to increase coverage because a tragic injury is out of proportion with the coverage available.

Regardless of the seriousness of the injuries, we cannot permit a potentially fortuitous coincidence to form the basis for an otherwise unsupportable legal conclusion.

An insured who pays premiums on several accident and health policies has a right to collect from the underwriters of each of those policies on the basis of a single injury covered by

each of the policies. Stated another way, one who has anticipated a particular need, and, in advance, contractually provided for same pays greater premiums and, in return, has greater coverage.

Thus, the driver of a borrowed automobile who has paid premiums for uninsured motorist coverage on his owned automobile is, and should be, in a different category (vis-a-vis uninsured motorist coverage) than a permissive user whose only uninsured motorist coverage is resulting from his permissive use of the vehicle. Though a permissive user is clearly entitled to be considered an ominbus insured as to the uninsured motorist coverage provided *that* vehicle, he has no other implicit or actual right. Louisiana drivers who, perceiving the need for uninsured motorist coverage in greater than the basic amounts, have the opportunity to purchase same and, in so doing, are entitled, under certain circumstances, to "stack" that coverage with the uninsured motorist coverage existent on an individually borrowed or leased vehicle, 3/ but that is only because the concerned individual anticipated his needs and, thereupon, contracted for *and paid for* additional coverage.

Therefore, even assuming, arguendo, that no problems of jruisdiction exist in this case, we conclude that the trial court was correct in granting summary judgment which is, accordingly, affirmed, at appellant's cost.

AFFIRMED.

LEMMON, J., concurs and assigns reasons.

3/ La. R. S. 22:1406D(1)(c)

LEMMON, Judge, concurs and assigns reasons.

The determinative issue in this case is whether the tortfeasor's automobile qualified as an uninsured motor vehicle under Louisiana's uninsured motorist (U. M.) law as it existed in July, 1974. 1/

The tortfeasor's car was covered by a policy which provided liability coverage of $50,000.00. Plaintiff's personal policy with Travelers provided U.M. coverage of $5,000.00 and Ford's commercial fleet policy with Liberty Mutual provided U. M. coverage of $5,000.00 for each of the 66 cars insured under the policy.

When R. S. 22:1406 was amended in 1972 to require insurers to permit an insured to increase his U.M. coverage to any amount not in excess of the policy's liability coverage, the definition of an uninsured motor vehicle was expanded to include an *insured* vehicle "when the automobile liability insurance coverage on such vehicle is less than the uninsured motorist coverage carried by the insured". 2/ The threshold question in determining whether the tortfeasor's car in this case qualified as an uninsured motor vehicle is whether stacking can be used to determine the total U.M. coverage "carried by the insured", or whether there must first be a determination that the tortfeasor's vehicle is uninsured (by comparison of the

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1/ Pretermitted, among other issues, is Liberty's substantial [but probably incorrect -see concurring opinion in *Deane v. McGee*, 261 La. 686, 260 So. 2d 669 (1972)] contention that the applicable law is that of Michigan, where its policy was issued.

2/ The statute was again amended by Act No. 154 of 1974 to "clarify the definition of an uninsured motor vehicle" to include an insured vehicle whose liability coverage is less than the amount of damages suffered by an insured.

tortfeasor's liability coverage to the single U.M. coverage "carried" by the insured on the vehicle involved in the accident) before stacking can be used to give the tort victim recovery on more than one U.M. coverage.

In *Phillips v. Barraza*, 320 So. 2d 587 (La. App. 4th Cir. 1975), decided while the 1972 amendment to R. S. 22:1406 was in effect, another panel of this court decided under similar facts that:

> "stacking is permitted . . . in order to meet the statutory requirement that the uninsured motorist coverage of the tort victim be in excess of the liability coverage of the tort feasor's vehicle".

The court in effect decided that if "stacking" is permitted in this jurisdiction, then "stacking" should be permitted for all purposes. Accordingly, plaintiff is entitled to stack the total U.M. coverage properly *available* to him in order to determine whether the total U.M. coverage "carried by the insured" exceeds the $50,000.00 liability limits of the tortfeasor's policy. See also *Rascoe v. Wilburn*, 295 So. 2d 201 (La. App. 3rd Cir. 1974).

The next determination, therefore, is the amount of the total U.M. coverage available to plaintiff. In this respect plaintiff contends that since he was an insured under the U.M. coverage on all 66 vehicles listed in Liberty Mutual's fleet policy, he may stack all 66 coverages.

Plaintiff relies on *Barbin v. United States Fid. and Guar. Co.*, 315 So.2d 754 (La. 1975), in which non-owner passengers were granted recovery under U.M. coverage provided on each of two cars described in the owner-driver's policy (although they were, of course, only occupying one car at the time of the accident). The *Barbin* decision was based on the reason-

ing that the term "insured" was defined under the U.M. coverage to include "any other person while occupying an insured automobile" and that the term "insured automobile" was defined as "an automobile described in the policy for which a specific premium charge indicates that coverage is afforded". 3/

In *Barbin*, if the court overconstrued the term "occupying", that position can best be justified on the basis that the named insured intended, in contracting for a family policy, to insure and to provide all possible coverage for his family members and his passengers, and that any reasonable construction favorable to an insured must prevail over a reasonable unfavorable construction. However, no such intention can reasonably be attributed to the insured under the commercial fleet policy in this case. 4/ It would not be reasonable to attribute to Ford Motor Company (or Ford Rent-a-Car) the intention to make its lessee an insured except as to the particular vehicle which was leased.

I would vote not to extend the *Barbin* decision to apply to commercial fleet policies covering numerous rental vehicles.

Accordingly, since the U.M. coverage on the other 65 cars described in Liberty Mutual's policy is not available to plaintiff, the total U.M. coverage properly available to him does

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3/ The *Barbin* decision was criticized as "holding under a strained interpretation of the policy that occupancy of any insured vehicle activated coverage for all vehicles". Work of the Louisiana Appellate Courts for the 1976-1977 Term - Insurance, 38 La. L. Rev. 313, 449 (1978).

4/ In the fleet policy the definition of "insured" is the same as in the policy in the *Barbin* case, but "insured automobile" is defined as "an automobile . . . described in the schedule as an insured automobile to which the bodily injury liability coverage of the policy applies".

not exceed $50,000.00, and the tortfeasor's vehicle does not qualify as an unisured motor vehicle. Both Liberty Mutual and Travelers were properly dismissed by summary judgment.

West Key Number System

SUPREME COURT OF LOUISIANA

New Orleans, 70112

April 27, 1979

NO. 64,406

EDWARD A. BRILEY

VS

FRANK S. FALATI, ET AL

In Re: Edward A. Briley, applying for Writ of review to the Court of Appeal, Fourth Circuit, Parish of Jefferson No. 9972.

Writ denied. The result is correct.
JLD
FWS
ATJR
JAD
PFC
WFM
FAB

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
April 27, 1979

Frans J. Labranch, Jr.
Clerk of Court

LINDA GAIL BURNS, w/o and DAVID BURNS
VS
EDWARD FERNANDEZ, TOLEDO NATIONAL
INSURANCE CO. and HARTFORD
INSURANCE COMPANY
and
NEW ORLEANS EASTER SEAL SOCIETY
INC. and NORTHWEST INSURANCE CO.

NO. 11,481 C/W 11,482

COURT OF APPEAL FOURTH CIRCUIT
STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH JUDICIAL
DISTRICT COURT FOR THE PARISH OF JEFFERSON,
STATE OF LOUISIANA, NO. 195-886,
CONSOLIDATED WITH NO. 194-254, DIVISION "M",
HONORABLE ROBERT J. BURNS, JUDGE,
PRESIDING.

JOHN C. BOUTALL
JUDGE

Filed June 10, 1981

REVERSED IN PART, AMENDED IN PART,
AND AFFIRMED IN PART AND RECAST.

This appeal arises from a judgment of the trial court awarding damages to the plaintiffs for personal injuries sustained in an automobile accident.

On October 26, 1976, at about 7:30 in the morning, one of the plaintiffs, Linda Burns, was operating a motor vehicle on behalf of her employer the New Orleans Easter Seal Society (hereinafter referred to as NOESS) when her vehicle was struck from the rear by an automobile being driven by the defendant Edward Fernandez. Mrs. Burns sustained injuries to her neck and back. Shortly thereafter, Mrs. Burns and her husband David Burns filed suit to recover damages for the personal injuries sustained by the former against Fernandez for his alleged negligence in causing the accident and injuries, Toledo National Insurance Co. and All-Star Ins. Corp. (hereinafter referred to as Toledo and All-Star respectively) as insurers of Fernandez, and Hartford Insurance Co. (hereinafter referred to as Hartford) as uninsured motorist insurer of NOESS. Fernandez amswered and filed a third party demand against Toledo and All-Star as his insurers requesting that they indemnify him for any sums of which he may be liable unto plaintiff. Toledo, by a petition of consursus, deposited $5,000 into the registry of the trial court which figure represented the maximum limits of its coverage. Hartford filed a third party demand against Fernandez, Toledo and All-Star for indemnification in the event Hartford was held liable unto the plaintiffs.

A second suit was filed by Mrs. Burns individually and against NOESS, as her employer, and its insurer Northwest Insurance Co. (hereinafter referred to as Northwest) for the recovery of workman's compensation benefits. NOESS and Northwest filed a third party demand against Fernandez, Toledo, and Hartford to recover any sums which they may be liable for unto the plaintiffs. These two suits were consolidated for trial.

Upon trial on the merits of this matter, the lower court entered judgment as follows: 1) in favor of the plaintiffs and against Fernandez and Toledo in the amount of $5,000, which figure represents the maximum amount of coverage under the insurance policy; 2) in favor of the plaintiffs and against Hartford in the amount of $31,960.35, which figure represents recovery under the uninsured motorist provision in the policy of NOESS; 3) in favor of the plaintiffs and against Edward Fernandez and Hartford in solido, in the amount of $10,000; 4) in favor of Northwest and against the plaintiffs and Hartford in the amount of $10,270.52; and 5) dismissal of the workman's compensation demands made by Mrs. Burns.

On appeal, a multitude of issues have been raised for our consideration. For the sake of clarity and understanding, each issue will be set apart and considered individually.

UNINSURED MOTORIST COVERAGE.

At the time of the accident on October 26, 1976 Fernandez was covered under two different policies of insurance; one with Toledo wherein coverage was provided in the amount of $5,000 per person and the other with All-Star wherein coverage amounted to $95,000 per person. Also, at this time, NOESS was insured by Hartford under a comprehensive liability policy which provided coverage for its fleet of vans as well as an uninsured motorist provision. All three of these insurers were named as defendants in this matter as per their respective policies of insurance. Subsequently, On March 1, 1977, by order of the Circuit Court of Milwaukee County, Wisconsin, All-Star was ordered liquidated because of its condition of insolvency. This court further ordered that all pending actions and proceedings against All-Star were thereby abated. A similar ruling was entered on April 22, 1977 by the District Court for the Parish of East Baton Rouge. Shortly before trial, Toledo

filed a petition for concursus and deposited $5,000 into the registry of the court, which figure represented the maximum limits of its coverage.

The uninsured motorist provision of the Hartford policy with NOESS provided coverage in the amount of $5,000 per person per vehicle or $10,00 per accident. This provision listed NOESS as the named insured and described those individuals who would be regarded as "persons insured" as follows:

> "II. PERSONS INSURED
>
> "Each of the following is an ***insured*** under this insurance to the extent set forth below:
>
> "(a) The ***named insured*** and any ***designated insured*** and, while residents of the same household, the spouse and relatives of either;
>
> "(b) any other person while ***occupying*** an ***insured highway vehicle***; and
>
> "(c) any person, with respect to damages he is entitled to recover because of ***bodily injury*** to which this insurance applies sustained by an ***insured*** under (a) or (b)."

The basic issue here is whether the plaintiffs will be permitted to "stack" the coverage for all 26 vans insured under the uninsured motorist provision or will their recovery be limited to the uninsured motorist benefits for the particular vehicle which Mrs. Burns occupied at the time of the accident. 1/

1/ At the time of this accident in October of 1976 R. S. 22:1406 had not as yet been amended so as to prohibit "stacking" under uninsured

Mrs. Burns contends that she is a named insured under the uninsured motorist provision and she whould be permitted to stack the coverage of all 26 vehicles covered under the policy, thereby exposing Hartford to a possible liability of $260,000. The trial court adopted this contention reasoning that since separate premiums were paid for the benefit of the employees of NOESS, Mrs. Burns would be permitted to stack the uninsured motorist coverage.

In Briley v. Falati, 367 So. 2d 1227 (4th Cir. 1979) Writ denied, 369 So. 2d 1379 (La. 1979) we were faced with a similar issue of whether to permit stacking under an uninsured motorist provision of an insurance policy. In that case we distinguish between the named insured and the permissive user in determining whether stacking would be allowed. The named insured was regarded as the party so named in the policy of insurance and the permissive user being the party insured merely by virtue of his presence in an insured vehicle. Stacking was permitted for the named insured based on the theory that premiums were paid for this particular type of coverage; it was not allowed for the permissive user as no additional premiums were paid for by him or on his behalf. Nevertheless, the permissive user would be allowed uninsured motorist benefits but only insofar as the vehicle in which he was present at the time of the accident. Furthermore, we noted that the permissive user would not be precluded from such coverage as R. S. 22:1406D (1) (b) permits such additional coverage for the permissive user provided he contracted for and paid for additional coverage. We stated therein:

> ". . . . Though a permissive user is clearly entitled to be considered an omnibus insured as to the

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1/ Continued
motorist provisions of insurance policies. The amendment prohibiting "stacking" was adopted by the legislature the following year in 1977 by Act No. 623 §(1).

> uninsured motorist coverage provided *that* vehicle, he has no other implicit or actual right. Louisiana drivers who, perceiving the need for uninsured motorist coverage in greater than the basic amounts, have the opportunity to purchase same and, in so doing, are entitled, under certain circumstances, to 'stack' that coverage with the uninsured motorist coverage existent on an individually borrowed or leased vehicle, but that is only because the concerned individual anticipated his needs and, thereupon, contracted for *and paid for* additional coverage.

The so-called "premium payment" rationale adopted by this court is not an original one. It has been adopted in several jurisdictions. See Lambert v. Liberty Mutual Insurance Co., 331 So. 2d 260 (Ala. 1976); Cunningham v. Ins. Co. of North America 213 Va. 72, 189 S. E. 2d 832 (1972); Sturdy v. Allied Mutual Ins. Co., 203 Kan. 783, 783, 457 P. 2d 34, 40 (1969).

In applying the above rationale to the case before us we find that the terms of the policy list NOESS as the named insured. The policy further indicates that Mrs. Burns in her capacity as an employee of NOESS is a permissive user insofar as the uninsured motorist provision is concerned as she was insured merely by virtue of her presence in the insured motor van owned by NOESS. These findings are consistent with the premiums paid by NOESS for uninsured motorist coverage. The policy indicates that NOESS paid a separate $9.00 premium for each of their 26 vehicles for uninsured motorist coverage in the amount of $5,000 per person per vheicle or $10,000 per accident per vehicle. The total premium that was paid was $234. It can't be seriously contended that the $234 premium paid by NOESS would permit stacking by both the named insured NOESS and the permissive user Mr. Burns. The premium payment rationale supports a finding that the premium paid was only sufficient to permit stacking by NOESS

and certainly not by Mrs. Burns. Stacking by the permissive user would be permitted had the appropriate premium been paid, but there is no record of any such payment by Mr. Burns or on her behalf by NOESS. Therefore, we reverse the finding of the trial court permitting stacking by Mr. Burns and hold that her recovery under the uninsured motorist provision of the Hartford policy is limited to the benefits as per the particular vehicle occupied by her at the time of the accident.

The trial court as well as the plaintiffs cite Seaton v. Kelly, 339 So. 2d 731 (La. 1976) in support of the view that stacking should be permitted in the case before us. However, we feel that a close reading of the rule of law used by the Supreme Court in that case in effect applies the premium payment rationale adopted by our court in Briley v. Falati, supra, and applied above. 2/ In Seaton v. Kelly, supra, stacking was permitted as follows:

> ". . . . . if a plaintiff is an insured under two or more policies or one policy covering two or more automobiles, pays premiums or has premiums paid for his benefit for two or more different uninsured motorist coverages, he can cumulate the coverages."

As indicated previously, the total premium of $234 was based on a premium of $9.00 per vehicle for uninsured motorist coverage. The employee is covered only while occupying a vehicle. Thus, Mrs. Burns is only insured under the policy language "to the extent" that she "occupied an insured highway vehicle". She only occupied one van and not 26 vans.

2/ We note that the rule of law enunciated in Seaton v. Kelly, supra, was adopted from numerous other cases from the Supreme Court. See Graham v. American Casualty Co. of Reading, Pa., 261 La. 85, 259 So. 2d 22 (1972); Deane v. McGee, 261 La. 686, 260 So. 2d (1972).

As to the other 25 vans she is not an insured. Premiums were not paid by NOESS for her benefit for two or more different uninsured motorist coverages, and Mrs. Burns could not be permitted to cumulate coverages.

AWARD OF DAMAGES: COMMUNITY OR SEPARATE PROPERTY?

The trial court in its judgment awarded unto Mr. and Mrs. Burns as plaintiffs the sum of $46,960.41 This award of damages was broken down into general and special damages as follows: $7,815.85 for medical expenses, $4,144.56 for loss of wages, and $35,000 for pain and suffering. The plaintiffs contend that the two items of special damages, namely the medical expenses and loss of wages, belong to their community property but that the award for general damages of pain and suffering is the separate property of Mrs. Burns. This contention is supported by Flowers vs. U. S. D & G Co., 381 So. 2d 378 (La. 1980) wherein the court stated:

> "A wife's action for damages resulting from offenses and quasi-offenses are her separate property and are recoverable by her alone. La. C. C. arts. 2334, 2402. On the other hand, claims for medical expenses for either spouse belong to the community and are recoverable by the husband as its head."

This case does not address the damage award for loss of wages, however, it is well settled that this form of damages falls into the community. Polman v. Mohasco. Corp. 371 So. 2d 838 (4th Cir. 1979).

Based on the foregoing we find that the trial court was in error in awarding the total amount of damages to both Mr. and Mrs. Burns. Accordingly, the judgment should be amended so as to award the general damages of $35,000 to Mrs. Burns individually and the special damages amounting to $11,960.41

be awarded to Mr. Burns as head of the community property regime.

THE RELEASE EXECUTED BY MRS. BURNS

As previously indicated, All-Star Insurance Corp., who was the secondary liability carrier for Fernandez, was ordered liquidated because of its condition of insolvency on March 1, 1977 by order of the circuit court of Milwaukee, Wisconsin. Notice of liquidation was made to all claimants and potential claimants who wished to share in the distribution of All-Star's assets. Apparently, Mrs. Burns filed a proof of claim against All-Star based on the alleged negligence of its insured Fernandez in causing the accident and her resulting injuries. This proof of claim contained a release provision which states:

> "RELEASE PROVISION. The undersigned hereby releases ***Edward Fernandez***, an insured of All-Star Insurance Corporation, to the extent of the insured's applicable policy limit, of and from liability to the undersigned on the cause of action or causes of action which the undersigned has asserted against the insured. It is understood that this Release shall be void if the insurance coverage of the insured is avoided by the Liquidator."

At the trial on the merits, Fernandez pleaded an exception of Res Judicata based on the contention that the release provision in the proof of claim filed by Mrs. Burns operated as a bar to recovery against Fernandez. This exception was denied by the trial court. In its reasons for judgment, the trial court found as a fact that All-Star was insolvent.

It is well settled in Louisiana jurisprudence that a valid compromise or release between parties to a legal proceeding requires some sort of cause of consideration. La. C. C. Art. 3071, Louette v. Security Industrial Insurance Co., 361 So.2d

1348 (3rd Cir. 1978); Hyatt v. Hartford Accident and Indemnity Co., 225 So. 2d 102 (3rd Cir. 1969). This consideration need only be an adjustment of differences and a desire to set at rest all possibility of litigation. Collier v. Administrator, Succession of Blevens, 136 So. 2d 774 (4th Cir. 1962).

We conclude that the trial court acted properly in denying the exception of Res Judicata thereby nullifying the effect of the release. Our conclusion is based on the fact that Mrs. Burns received no cause or consideration in executing the release provision. All-Star already owed Mrs. Burns the full amount (within its limits) of her damages, and therefore the promise on All-Star's behalf to pay *part* of the already-existing debt gave Mrs. Burns nothing and could not have been a true cause or consideration for her promise of release. Additionally, from a somewhat different standpoint, one could conclude that the release provision was predicated on the proposition that All-Star would assume the liability of its insured, Fernandez, to the extent of the policy limits. When All-Star was liquidated and unable to assume this liability, there was no longer any consideration for the release of Fernandez. The other basis used in reaching our conclusion is the last clause contained in the release provision itself. It indicates that the release shall be voided if the insurance coverage of the insured is avoided. This clause is directly applicable to the matter before us as the claim by Mrs. Burns was apparently avoided by the liquidator.

AWARD OF DAMAGES

To facilitate our discussion of the award of damages we will consider the trial court's award of damages. We will consider initially the trial court's award for medical expenses, loss of wages and pain and suffering, followed by a review of its judgment denying the claim of Mrs. Burns for damages for her alleged mental condition.

I

The evidence reveals that after the auto accident, on the morning of October 26, 1976, Mrs. Burns returned to work that same day. She went to work the next day but left early because of the pain she was experiencing in her neck and shoulder. The next morning, or two days after the accident, Mrs. Burns was unable to get out of bed due to the pain in her neck and arm. Consequently, she was taken to the emergency room at East Jefferson Hospital for examination and treatment. Later that same day, Mrs. Burns was transferred to Metairie Hospital where she remained for four to five days. During this period of hospitalization X-rays were performed by Dr. Daniel O'Quinn which apparently proved negative. An examination by Dr. O'Quinn revealed that Mrs. Burns had soft tissue damage in the area of her neck. The plaintiff received injections of xylocaine and cortisone, as well as medication to relieve the pain associated with this soft tissue injury. She was discharged on Nobember 1, 1976.

Following her discharge, Mrs. Burns continued to experience pain in the neck area. On November 11, 1976, the plaintiff went to see Dr. Vernon Kroll, a general surgeon. At that time his examination revealed that Mrs. Burns had no localizing neurological defects, but she did have a limitation of motion of the head upon the neck and spasticity of the neck muscles, particularly the trapezius. The plaintiff's condition did not improve over the course of the next few weeks and she was re-hospitalized on December 17, 1976 at Southern Baptist Hospital for treatment and tests. Upon her admittance to the hospital, Mrs. Burns was placed in traction at the recommendation of Dr. Kroll. At the conclusion of the traction period she continued to experience pain in the area of her neck whereupon Dr. Donald Richardson, a neurological surgeon, was called in to review her case. Dr. Richardson's examination revealed findings similar to those made by Dr. Kroll. A myelogram was performed on the plaintiff which revealed a large

cervical disc puncture at the C-4 disc level which could not be successfully treated by conservative therapy. Consequently, surgery was performed on January 12, 1977 resulting in the removal of her disc at the C-4 level. Following the surgery, Mrs. Burns remained in the hospital for an additional 7 days after which she was discharged and told by Dr. Richardson to remain in bed for 3 weeks. Dr. Richardson prescribed a cervical collar for the plaintiff as well as medication to relieve the pain associated with the surgery. Examination by him one month after the surgery revealed that Mrs. Burns was recovering according to schedule. At that time, she complained of mild neck and shoulder discomfort. Dr. Richardson permitted the plaintiff to increase her activities including driving an automobile. Over the course of the next 6 months, the plaintiff continued to visit Dr. Richardson for examination and treatment of the pain in her neck area. X-rays performed in August of 1977 revealed that the fusion was fusing properly. Mrs. Burns was discharged at the time whereupon Dr. Richardson gave the following prognosis: the plaintiff has a permanent disability in the cervical spine area of 10 to 20%; the plaintiff would be able to return to work including the same activities that she performed prior to the surgery; and she had no limitation in the use of her upper extremities.

At the time of her discharge in August of 1977 Dr. Richardson suggested that Mrs. Burns visit Dr. Kroll for further medical care. Dr. Kroll examined and treated the plaintiff on a monthly basis through April of 1978, after which she was apparently discharged. Mrs. Burns continued to complain of pain in the neck area during the course of these visits. After this series of examinations, Dr. Kroll came to the conclusion that as of April, 1978 Mrs. Burns would be unable to return to any occupation which would require persistent use of her extremities, such as driving or picking up weights. This conclusion was not permanent as it was possible that the plaintiff could be rehabilitated at some point in time in the future.

Finally, the testimony of both Drs. Richardson and Kroll reflect the view that the injuries and subsequent surgery were caused by the accident.

Based on this evidence the trial court entered judgment awarding to the plaintiffs $7,815.85 in medical expenses, $4,144.56 in lost wages and $35,000 for pain and suffering for a total figure of $46,960.41. The plaintiffs contend that the evidence presented warrants an increase in the award. However, upon a review of the evidence presented we conclude that the award by the trial court was not manifestly erroneous and did not constitute an abuse of discretion. Reck v. Stevens, 373 So. 2d 498 (La. 1979).

We recognize the conflict in the prognoses given by Drs. Richardson and Kroll. Apparently, the trial court adopted the view of Dr. Richardson in reaching its decision as to the award of damages. It is well settled that the trial court as the trier of fact is in the best position to view the testimony of the various witnesses, and its findings cannot be disturbed in the absence of an abuse of discretion. Canter v. Koehring Co., 283 So. 2d 716, 724 (La. 1973). Accordingly, we find that the trial court has not committed an abuse of discretion.

II

As indicated previously, we are now faced with a review of the trial court denial of the claim raised by Mrs. Burns for damages for her alleged mental condition.

A review of the record before us indicates that Mrs. Burns has had a history of emotional disturbances and periods of depression and anxiety dating back to the time when she was six years old, when nerve medication was prescribed for her. A review of this history can be described best by considering the events in her life prior to the accident and those occurring after the accident. During the pre-accident period of her life,

Mrs. Burns had encountered numerous surgeries including: 15 dilation and curettages, a hysterectomy, a hemorrhoidectomy, a tonsilectomy, an appendix removal and a skin removal. Other medical difficulties experienced by the plaintiff included 6 miscarriages, periods of blood vomiting, a heart murmur, and a gastric ulcer. Besides these numerous problems and the trauma and anxiety associated with them, Mrs. Burns has experienced other pre-accident difficulties which have affected her mental condition. They include: several periods of separation from her husband, one for a period of nine months, a period of time in which her mentally disturbed brother-in-law lived with her, and a weight condition. These numerous mental and physical problems caused her to miss work at NOESS on numerous occasions. These absences became so numerous that NOESS asked her to resign her position of employment, but no such resignation was made. Mrs. Burns attributed these absences in large part to the marital difficulties she was experiencing.

Following the accident and the subsequent surgery the plaintiff fell into a state of depression and high anxiety. Apparently this condition existed up until October of 1977 or 1 year after the accident. On October 28, 1977 Mrs. Burns was examined by Dr. Kroll who testified that her mental condition had improved. Upon subsequent visits in November and December of 1977, and January of 1978, the plaintiff's emotional condition improved substantially. Her next and last visit with Dr. Kroll was in April of 1978 when Mrs. Burns had returned to a depressed state, which Dr. Kroll, attributed to the death of her father in March of 1978.

Some four months later on August 15, 1978, or approximately, 1 year and 10 months after the accident, Mrs. Burns visited Dr. Albert Cohen, a psychiatrist. Dr. Cohen conducted a 45 minute interview with the plaintiff, most of which centered around a review of her history. Based on this 45 minute interview and a brief review of some of the medical reports of Drs. Kroll and Richardson, Dr. Cohen concluded that the plaintiff's

condition of depression and anxiety were caused by the accident occurring in October of 1976. Dr. Cohen next saw Mrs. Burns approximately one year later in July of 1979. After this brief interview he reached the same conclusion that her mental condition was caused by the accident. He further indicated that Mrs. Burns was in need of psychiatric treatment for a period of 6 months to 2 years.

In denying Mrs. Burns claim of damages for her alleged mental condition, the trial court gave the following reasons: 1.) The accident experienced by the plaintiff was another in a series of traumatic events in her life; 2.) the plaintiff would be in her present mental condition whether this accident did or did not occur; 3.) because of her past problems Mrs. Burns was very vulnerable; and 4.) the loss of her father had a substantial impact upon her emotional condition.

After considering both the evidence and the judgment of the trial court, we cannot say that its decision to deny damages for Mrs. Burns' mental condition was manifestly erroneous. The trial court's reasons for judgment are accurate and indicative of the careful consideration given by that court to this particular matter. In further consideration of this issue we note that the trial court considered the depression and anxiety experienced by the plaintiff in connection with the accident in reaching its award of $35,000 for pain and suffering.

Although Dr. Cohen testified that the plaintiff had a mental condition and futher that this condition was caused by the accident, there is ample basis to support the trial judge's discounting of this testimony. The interview conducted with Mrs. Burns was very brief, only 45 minutes, and occurred almost two years after the accident, making it difficult to believe that such an interview could yield an accurate conclusion; Mrs. Burns had experienced numerous other emotional difficulties since the accident including the breakup of her marriage, the death of her father and gall bladder surgery,

making it more probable than not that her condition some two years after the accident was attributable to these events as opposed to the accident itself; and the testimony of Dr. Kroll that Mrs. Burns' mental condition had improved substantially as of January 1978, after which her condition regressed dramatically due to the death of her father.

THE INABILITY TO PAY DOCTRINE

In the judgment entered by the trial court the liability of Fernandez was limited to $10,000. In reaching this decision the court relied on the inability to pay doctrine as applied in Barnett v. Vanney, 360 So. 2d 617 (4th Cir. 1978). Under this doctrine the inability of a defendant to pay a judgment is a proper consideration in assessing the amount of damages for which a defendant will be held liable for his tortious acts.

In reviewing our previous findings regarding the award of damages we indicated that a total award of $46,960.41 was not an abuse of discretion. Recall that this damage award consists of $7,815.85 in medical expenses, $4,144.56 in lost wages, and $35,000 for pain and suffering. Thus almost $12,000 (plus interest for about 3 years) are special damages, and that amount, even after deduction of Fernandez's $5,000 insurance, will almost consume Fernandez's alleged entire net worth of $10,000. Under those circumstances, as in Becnel v. Ward, 286 So. 2d 731 (La. App. 4th Cir. 1973) writ refused 290 So. 2d 900, the quantum set by the trial judge must remain beyond defendant's ability to pay and he may face bankruptcy in any event. Accordingly, there appears no reason to apply the inability to pay doctrine (which in effect was not truly applied against plaintiffs but rather against Hartford in the judgment) against the plaintiffs.

We point out that the trial judge fixed the total damages at $46,960.41, which we consider to be a fair award. Liability

for this sum is only $5,000 from the Toledo policy and $5,000 from the Hartford policy. If we apply the inability to pay doctrine and limit Fernandez's liability to $10,000 the plaintiffs are limited in recovery to $20,000. Deducting the special damages of $11,960.41 leaves plaintiffs with a recovery of only $8,039.59 for general damages as opposed to the $35,000 set by the court. (The recovery of $10,275.52 of this amount by Northwest as workman's compensation carrier under R. S. 23:1101 and 1103 is presumably offset by plaintiffs' previous receipt of that amount from Northwest). 3/ Thus the effect of limiting the liability of Fernandez is to deny the recovery for the damages they have suffered.

The inability to pay doctrine has a long history dating back to 1898 when it was first applied in Loyacano v. Jurgens, 50 La. Ann. 441, 23 So. 717 (1898). Since that time it has been applied on numerous occasions by the various courts of our state. As indicated previously, the rule permits the admittance of evidence concerning the ability of the defendant

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3/ The recovery of the workman's compensation carrier payments is not governed by the same rules applicable to recovery by plaintiffs. We call attention to the case of Fontenot v. Hanover Insurance Company, 385 So. 2d 283 (La. 1980) which differentiates between the recovery of the carrier from the tort-feasor and the right of preferential payment under the statute against the employee. The court noted, 385 So. 2d 240: "It does not appear that the legislature intended for the employer to be reimbursed from the employee's award for items which the employee has not recovered from the third person."

Along this same line of reasoning, we also note the case of Bannon v. Edrington, 392 So. 2d 186 (La. App. 4th Cir. 1980) writs granted, in which we held that a workman's compensation payer does not have a claim against proceeds from an action against an uninsured motorist insurer.

to respond in damages to be considered in determining the amount of the judgment to be awarded. The theory behind this doctrine was espoused by our learned brothers of the 2d Circuit in Cole v. Sherill, 7 So. 2d 205 (2d Cir. 1942), wherein it was stated:

> "It has never been considered good policy to bankrupt one to pay another even though the award granted is not in line with other cases involving the same inand might not fully compensate the plaintiff for the injuries he received. Fair justice between both parties must be arrived at."

We are hard pressed to understand how such a doctrine could remain in our jurisprudence in light of the equally well known policy of Louisiana law that damages awarded in tort cases are compensatory in nature and not punitive. If damages are to be compensatory they should be assessed according to the plaintiff's injuries as a result of the defendant's fault and not according to the defendant's economic position in life. Moreover, it appears to us that there may be merit to the argument that the application of the inability to pay doctrine is violative of the Equal Protection Clause of Art. 1 §3 of the Louisiana Constitution in that a defendant in a tort suit is classified according to his degree of wealth. For the defendant who is in impecunious circumstances his liability for his tortious acts is limited according to these circumstances whereas for the defendant whose financial disposition is not restricted, his liability for his delicts is limitless. We do not suggest that such a classification is a suspect one or that there is a violation of a fundamental constitutional right. Chabert v. La. High School Athletic Association, 323 So. 2d 774 (La. 1975). Howeven, we submit that this classification appears to be arbitrary. Furthermore, perhaps the theory behind the doctrine is not a rational one in light of the prevailing rule of law that, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." La. C. C. Art.

2315. Equally troublesome to us is the paradox in the law which permits the admittance of evidence on a defendant's inability to pay for his tortious acts but does not permit evidence on the defendant's ability to pay. Ashley v. Nissan Motor Corp. in USA, 321 So. 2d 868, 874 (1st Cir. 1975).

In recent years the equity and usefulness of this doctrine has been challenged. Most notably in Davis v. Moore 354 So. 2d 1379 (La. 1978), where a justice of the Supreme Court, concurring in the court's decision to deny a writ of certiorari or review, indicated that the court should, ". . . .overrule the doctrine that the poverty of the defendant should reduce damages for which a tortfeasor is held liable. . ." Also see: Davis v. Moore, 353 So. 2d 740, 743 (4th Cir. 1977). Furthermore, we note that because of the harsh consequences which this doctrine can create in its application certain limitations have been placed upon its application. In Lacaze v. Horton, 100 So. 2d 252 (2d Cir. 1958) the court indicated that this doctrine should not be applied to the extreme. The court stated:

> "It must be borne in mind that this principle is not intented to completely relieve a defendant of liability for reparation of damages inflicted by his own negligence, nor should it be considered as justifying the reduction of the allowance of damages to a bare minimum. Either of these alternatives, in our opinion, would be an extreme application of the principle and would result in effecting a gross injustice toward a plaintiff, under the guise of the application of a humane consideration for the plight of an impecunious defendant."

A second limitation was adopted in Daniels v. Conn, 382 So. 2d 945, 953 (La. 1980) wherein the court indicated that:

> ". . . . where there are solvent and insolvent tort-

feasors liable in solido, evidence of the insolvent defendant's inability to pay may not be considered by the trial judge (trier of fact) in determining damages to be awarded to the plaintiff, or in apportioning damages as between those joint tortfeasor defendants at the trial on the merits of plaintiff's claim."

In considering the foregoing, an application of the inability to pay doctrine to the facts before us represents an application to the extremes. By limiting the liability of Fernandez to $10,000, coupled with the liability of Hartford and Toledo and the claim of Northwest as the workman's compensation insurer, the recovery by plaintiffs is inadequate and unreasonable. As indicated in the jurisprudence above, this doctrine should not be used to reduce the allowance of damages to the plaintiffs to a bare minimum. Therefore, we find that the trial court was in error in limiting the liability of Fernandez to the sum of $10,000.

For the reasons expressed, the judgment of the trial court is reversed in part, amended in part and affirmed in part, and recast as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there is judgment in favor of plaintiffs in the sum of $46,960.41, apportioned $35,000 to Linda Gail Burns and $11,960.41 to David Burns on behalf of the community between them, and against the defendants as follows:

1) against Edward Fernandez and Toledo National Insurance Company in solido for $5,000 with legal interest from judicial demand until filed in registry of court;

2) against Edward Fernandez and Hartford Insurance Company in solido for $5,000, with legal interest from date of judicial demand until paid;

3) against Edward Fernandez for $36,960.41, with legal interest from date of judicial demand until paid.

IT IS FURTHER ORDERED there be judgment in favor of Northwest Insurance Company and against plaintiffs, Linda Gail Burns and David Burns, and the defendants Edward Fernandez and Toledo National Insurance Company recognizing its claim in the amount of $10,270.52 and granting apportionment of the above judgment in accordance with R. S. 23:1103 and with Fontenot v. Hanover Insurance Comapny, 385 So.2d 238 (La. 1980).

Those portions of the judgment appealed dismissing the workman's compensation demands of Linda Gail Burns against Northwest Insurance Company and the Easter Seal Society and setting expert witness fees are affirmed.

Trial court costs are assessed against defendants Edward Fernandez, Toledo National Insurance Company and Hartford Insurance Company in solido. Appellate court costs are assessed against defendants Edward Fernandez and Toledo National Insurance Company in solido.

REVERSED IN PART, AMENDED IN PART, AND AFFIRMED IN PART AND RECAST.

[57] THE COURT: Why don't you mark it as such.

EXAMINATION

BY MR. NOSEWICZ:

Q. Mr. Metcalf, in calculating the premium that was charged to Fischbach and Moore for automobile liability coverage under the 1977 to 1978 policy, was there a specific charge made for vehicles owned by Fischbach and Moore in Louisiana?

A. No.

Q. How was the premium for automobile liability coverage calculated from 1977-'78 policy?

A. We utilized the method that we call lost ratings and we take the three past years of losses before the effective date and relate them back to payroll and get a rate and let them dictate what the premium will be for the upcoming year, basically.

Q. The number of vehicles owned by Fischbach and Moore in Louisiana or leased by them had no bearing for the rate on automobile liability coverage?

A. No.

Q. Is that correct?

A. That's correct.

MR. MARS: Judge, we make the same objection to relevancy as we made previously.

THE COURT: Yes. Well, that was a leading question.

[58] EXAMINATION

BY MR. NOSEWICZ:

Q. Mr. Metcalf, under the terms of the coverage written or the agreement between Travelers and Fischbach and Moore, were loss in the automobile policy, was there any retention by Fischbach and Moore?

A. Yes. There was, basically, a deductible for which Fischbach and Moore paid the first 250,000 of any one loss.

Q. And loss is defined how?

A. Any loss that comes about as a result of the insuring of a Fischbach and Moore acount.

MR. NOSEWICZ: That's all I have, Your Honor.

CROSS-EXAMINATION

BY MR. MARS:

Q. Mr. Metcalf, Travelers doesn't give uninsured motorist coverage to Fischbach and Moore, do they, for free? Do they give it to them for no cost at all?

A. Basically, yes, that's what's been done here.

Q. You mean Travelers Insurance Comapny gives uninsured motorist insurance to Fischbach and Moore?

A. Yes.

Q. But the premium that is eventually retrorated

* * * * *

[68] strickly an argumentative question. What you do under

certain circumstances - - Well, you can tell me that as well as this witness can tell me.

MR. COMBE: Your Honor, may I make a proffer?

THE COURT: You certainly may.

MR. COMBE: This will be part of the defendant's proffer.

EXAMINATION

BY Mr. COMBE:

Q. You may answer the question under the proffer, Mr. Rovin. I'll repeat the question.

If prior to the renewal of the automobile renewal insurance policy with Travelers on April 1st, 1977 you had been advised that Fischbach and Moore could have obtained $1,000,000 of uninsured motorist coverage on its vehicles located in Louisiana, would you have recommended that Fischbach and Moore take such a coverage?

A. We would have strongly recommended against it. It would have been against - - the insured paid a deductible, and, therefore, it would have been against any reason why he would take higher limits. He would be paying for himself. And if he had the loss, and since it really does not benefit the insured we would strongly recommend against it.

Q. How much is that retention?

[69] A. $250,000.

MR. COMBE: Thank you, Your Honor. That concludes our offer of proof.

THE COURT: Now, you have a right to ask questions

on the offer of proof without in any way waiving your objection. You need not do so, and it won't be held against you if you do so.

MR. MARS: No. No questions.

THE COURT: All right, thank you.

That concludes the offer of proof.

MR. MARS: In conjunction with the offer of proof - -

MR. COMBE: Your Honor, in connection with the defendant's case, we would like to offer, introduce, and file into evidence and mark for identification Defendant's 20 the deposition of George Wildes.

We would like to offer, introduce, and file into evidence and mark for identification Defendant's 21, the deposition of Thomas Jackson.

MR. MARS: Wait a minute. Your Honor, I object to the introduction of the deposition. Mr. Wildes is the insurance manager of Fischbach and Moore. He ought to be down here testifying. And Mr. Jackson is his senior vice-president of Travelers Insurance Company. That deposition has no relevancy in those proceedings.

MR. COMBE: Your Honor, if the Court please, I am

* * * * *

UNINSURED MOTORISTS INSURANCE COVERAGE PART

ADDITIONAL DECLARATIONS
Forming part of Policy No. TR-NSA-114T829-9-77

Designated Insured

Description of *Insured Highway Vehicles* (Check appropriate box)

- x Any *automobile* owned by the *named insured* **SEE END 9950**
- ☐ Any *private passenger automobile* owned by the *named insured*
- ☐ Any *highway vehicle* to which are attached dealer's license plates issued to the *named insured*
- ☐ Any *highway vehicle* for which a premium designated by the letters "UM" is included in the declarations of the policy and a *highway vehicle* ownership of which is acquired during the policy period by the *named insured* as a replacement therefor
- ☐ Any *mobile equipment* owned or leased by and registered in the name of the *named insured*
- ☐

Protection Against UNINSURED MOTORISTS INSURANCE

I. Coverage U-Uninsured Motorists (Damages for Bodily Injury)

The company will pay all sums which the *insured* or his legal representative shall be legally entitled to recover as damages from the owner or operator of an *uninsured highway vehicle* because of *bodily injury* sustained by the *insured*, caused by accident and arising out of the ownership, maintenance or use of such *uninsured highway vehicle;* provided, for the purposes

of this coverage, determination as to whether the ***insured*** or such representative is legally intitled to recover such damages, and if so the amount thereof, shall be made by agreement between the ***insured*** or such representative and the company or, if they fail to agree, by arbitration.

No judgment against any person or arganization alleged to be legally responsible for the ***bodily injury*** shall be conclusive, as between the ***insured*** and the company, of the issues of liability of such person or organization or of the amount of damages to which the ***insured*** is legally entitled unless such judgment is entered pursuant to an action prosecuted by the ***insured*** with the written consent of the company.

Exclusions

This insurance does not apply:

(a) to ***bodily injury*** to an ***insured*** with respect to which such ***insured***, his legal representative or any person entitled to payment under this insurance shall, without written consent of the company, make any settlement with any any person or organization who may be legally liable therefor;

(b) to ***bodily injury*** to an ***insured*** while ***occupying*** a ***highway vehicle*** (other than an ***insured highway vehicle)*** owned by the ***named insured***, and designated insured ***or any relative resident in the same household as the*** named ***or designated insured***, or through being struck by such a vehicle, but this exclusion does not apply to the ***names insured*** or his relatives while ***occupying*** or if struck by a ***highway vehicle*** owned by a ***designated insured*** or his relatives;

(c) so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workmen's compensation or disability

benefits law or any similar law.

II. Persons Insured

Each of the following is an ***insured*** under this insurance to the extent set forth below:

(a) The ***named insured*** and any ***designated insured*** and, while residents of the same household, the spouse and relatives of either;

(b) any other person while ***occupying*** an ***insured highway vehicle***; and

(c) any person, with respect to damages he is entitled to recover because of ***bodily injury*** to which this insurance applies sustained by an ***insured*** under (a) or (b) above.

The insurance applies separately with respect to each ***insured***, except with respect to the limits of the company's liability.

III. Limits of Liability

Regardless of the number of (1) persons or organizations who are ***insureds*** under this policy, (2) persons who sustain ***bodily injury***, (3) claims made or suits brought on account of ***bodily injury***, or (4) ***highway vehicles*** to which this policy applies,

(a) The limit of liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages because of ***bodily injury*** sustained by one person as the result of any one accident and, subject to the above provision respecting "each person", the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages because of ***bodily injury*** sustained by two or more persons as the result of any one accident.

(b) Any amount payable under the terms of this insurance

because of ***bodily injury*** sustained in an accident by a person who is an ***insured*** ender this coverage shall be reduced by

(1) all sums paid on account of such ***bodily injury*** by or on behalf of

(i) the owner or operator of the ***uninsured highway vehicle*** and

(ii) any other person or organization jointly or severally liable together with such owner or operator for such ***bodily injury***,

including all sums paid under the ***bodily injury*** liability coverage of the policy, and

(2) the amount paid and the present value of all amounts payable on account of such ***bodily injury*** under any workmen's compensation law, disability benefits law or any similar law.

(c) Any payment made under this insurance to or for any ***insured*** shall be applied in reduction of the amount of damages which he may be entitled to recover from any person or organization who is an ***insured*** under the ***bodily injury*** liability coverage of the policy.

(d) The company shall not be obligated to pay under this insurance that part of the damages which the ***insured*** may be entitled to recover from the owner or operator of an ***uninsured highway vehicle*** which represents expenses for medical services paid or payable under the medical payments coverage of the policy.

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

UNINSURED MOTORISTS INSURANCE

UNINSURED MOTORISTS INSURANCE COVERAGE
PART-SPECIFIED CAR BASIS

It is agreed that this part applies only to the *automobile* designated below:

Automobiles and State of Principal Garaging
ALL AUTOMOBILES PRINCIALLY GARAGED IN ALL STATES

Limits of Liability
Each Person Each Accident
$EQUAL TO $ MINIMUM
FINANCIAL RESPONSIBILITY
LIMITS OF THE STATE WHERE THE AUTOMOBILE IS PRINCIPALLY GARAGED

Premium
SEE COMPOSITE ENDORSEMENT 8000(2)

Amending Policy No. TR-NSA-114T829-9-77

This endorsement is issued by that member of The Travelers Insurance Companies which issued the policy of which this endorsement forms a part.

Opposition

NO. 81-545

Office - Supreme Court, U.S.
FILED
NOV 24 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

TRAVELERS INSURANCE COMPANY
Petitioner

VERSUS

MRS. CONSTANCE A. FENASCI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF THOMAS J. FENASCI, AND ALSO AS NATURAL TUTRIX OF THE MINOR, GERALD P. FENASCI AND THADDEAUS FENASCI, CONSTANCE FENASCI RODRIGUEZ, MICHAEL FENASCI, THOMAS J. FENASCI, JR. AND MRS. RITA BREITLING COOK, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF DONALD EUGENE COOK, AND AS NATURAL TUTRIX OF THE MINOR, JULIE ANN COOK, AND DONNA JEAN COOK, AND MRS. MARIE T. BANNON, INDIVIDUALLY AND AS TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF JOHN A. BANNON, AND LORRAINE M. BANNON DUNCAN AND JOHN A. BANNON, JR.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

MARS & MEDO
THEODORE A. MARS, JR.
Attorney for Respondents
Mrs. Rita Breitling Cook, et al
STEVEN O. MEDO, JR.
Attorney for Respondents
Mrs. Marie T. Bannon, et al
1220 First NBC Building
New Orleans, Louisiana 70112
(504) 581-7700

SILVESTRI, MARINARO & MASSICOT
JOHN PAUL MASSICOT
Attorney for Respondents
Mrs. Constance A. Fenasci, et al
577 South Carrollton Ave.
New Orleans, LA 70118
(504) 866-9631

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

ISSUES ANSWERED IN THIS RESPONSE:

I.

The United States Court of Appeals followed the applicable controlling State law and properly affirmed the decision of the District Court in this diversity case.

II.

The Court of Appeals interpreted the insurance contract in accordance with the laws of Louisiana, a state in which the parties intended for the contract to apply, with no violation of either the Equal Protection Clause or Due Process Clause of the United States Constitution.

III.

The application of Louisiana law which allows stacking of the uninsured motorist protection coverage on vehicles beyond its jurisdictional limits is in compliance with the Full Faith and Credit Clause, Due Process Clause and the Commerce Clause of the United States Constitution.

RESPONDENTS' ADDITIONAL ARGUMENTS:

IV.

The Court of Appeals for the Fifth Circuit applied the appropriate Louisiana law.

V.

The Supreme Court should not grant certiorari in this case because none of the considerations mandated by Rule 17 are present.

LISTING OF ALL PARTIES TO THE PROCEEDING PURSUANT TO RULE 28.1

1. All parties listed in the caption and identified as Respondents.

2. All parties listed by Petitioner on page ii of its Petition for Writ of Certiorari

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FIFTH CIRCUIT

The opinion of the Court of Appeals denying Petition for Rehearing and Petition for Rehearing En Banc, appears at Petitioner's Appendix, pp. 33-34.

The opinion of the Court of Appeals affirming the judgment of the District Court is reported at 642 F.2d 986. (Petitioner's Appendix, pp. 19-32).

The judgment of the court below was entered on April 17, 1981. A Petition for Rehearing and Suggestion for Rehearing En Banc were timely filed and were denied on June 18, 1981. (Petitioner's Appendix, pp. 33-34).

DISTRICT COURT

The opinion of the District Court was not reported, but the minute entry of the Court dated January 2, 1979, appears at Petitioner's Appendix, pp.1-8 and the minute entry dated August 3, 1979, appears at Petitioner's Appendix, pp.9-18.

JURISDICTION

The jurisdiction of this Court was invoked by

petitioner, Travelers Insurance Company, under 28 U.S.C. §1254(1).

STATUTE INVOLVED

L.S.A. - R.S. 22:1406 D, as amended by Acts, 1975 No. 494 §1.

> "D. The following provisions shall govern the issuance of uninsured motorist coverage in this state. (1)(a) No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy, under provisions filed with and approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom: provided, however that the coverage required under this Subsection shall not be applicable where any insured named in the policy shall reject the coverage or select lower limits. Such coverage need not be provided in or supplemental to a renewal or substitute policy where the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer.
>
> (b) Any insurer delivering or issuing an automobile liability insurance policy referred to herein, shall also permit the insured, at his request, to increase the coverage applicable to uninsured motor vehicles provided for herein to

any amount not in excess of the limits of the automobile liability insurance carried by such insured."

L.S.A. - R. S. 22:1406 D(1)(c), as amended by Acts, 1977 No. 623.

(c) If the insured has any limits of uninsured motorist coverage in a policy of automobile liability insurance, in accordance with the terms of Subsection D(1), then such limits of liability shall not be increased because of multiple motor vehicles covered under said policy of insurance and such limits of uninsured motorist coverage shall not be increased when the insured has insurance available to him under more than one uninsured motorist coverage provision or policy; provided, however, that with respect to other insurance available, the policy of insurance or endorsement shall provide the following:

With respect to bodily injury to an injured party while occupying an automobile not owned by said injured party, the following priorities of recovery under uninsured motorist coverage shall apply:

(i) The uninsured motorist coverage on the vehicle in which the injured party was an occupant is primary;

(ii) Should that primary uninsured motorist coverage be exhausted due to the extent of damages, then the injured occupant may recover as excess from other uninsured motorist coverage available to him. In no instance shall more than one coverage from more than one uninsured motorist policy be available as excess over and above the primary coverage available to the injured occupant.

STATEMENT OF CASE

On July 29, 1977, three employees of Fischbach and Moore, while riding to work in a vehicle owned by Fischbach, were killed in an automobile accident caused by the negligence of an underinsured mototist. Louisiana's Uninsured Motorist Statute, L.S.A. - R.S. 22:1406 D, includes protection against damage caused by underinsured motorists.

Travelers insured Fischbach and provided underinsured motorist protection on all of its vehicles as required by each state wherein the vehicle was principally garaged. (See Petitioner's Appendix, p. 103). While Travelers insured Fischbach, a national corporation, there is no mention anywhere in its policy that the policy was "a commercial fleet policy", or that the coverage was in anyway unique or different from any other insurance policy. To the contrary, this Travelers' policy expressly provided, and the Travelers and Fischbach intent was to provide "family protection or uninsured motorist insurance to the minimum extent required by the law of the state in which each owned or hired automobile is principally garaged, . . . " (Travelers Policy issued to Fischbach).

Pursuant to a jury verdict, a judgment was rendered by the United States District Court for the Eastern District of Louisiana against Travelers for ONE MILLION FOUR HUNDRED TWENTY THOUSAND AND NO/100 ($1,420,000.00) DOLLARS, stacking sufficient vehicles insured under the policy to satisfy the judgment. On April 17, 1981, the United States Court of Appeals, Fifth Circuit, affirmed the judgment, Per Curiam, and on June 18, 1981, denied Travelers' Petition for Rehearing, also Per Curiam. Both of these opinions appear in Petitioner's Appendix, commencing on pp. 19 and 33, respectively.

Travelers then sought to obtain a stay of the mandate from both the Fifth Circuit and from Justice Powell of this Honorable Court. Both stays were denied, and the judgment in favor of each plaintiff was paid in full, together with interest and costs.

While Plaintiffs-Respondents did have various personal uninsured-underinsured motorist protection, the Travelers' policy is primary, and must be exhausted before recovery from the personal insurers. Under Louisiana law there can be no double recovery.

This brief is filed in opposition to Travelers' Petition for Writ of Certiorari.

ARGUMENT
RESPONSE I.

The United States Court of Appeals followed the applicable controlling State law and properly affirmed the decision of the District Court in this diversity case.

Petitioner seeks to have this Court grant certiorari and reverse a decision of the Fifth Circuit Court of Appeals. The Fifth Circuit has exhaustively considered the matter in both its original Per Curiam opinion, and its Per Curiam denial of rehearing. (Petitioner's Appendix pp. 19 and 33). The Fifth Circuit was so satisfied with the correctness of its conclusion that it denied a stay of the mandate, pending application for Writ of Certiorari to this Court. Thereafter, Travelers sought to obtain a stay from Justice Powell of this Court, which stay was also denied. The entire Judgment, plus interest and costs, has been paid in full.

Respondents respectively suggest that this Petition for Writ of Certiorari should be denied. The Fifth Circuit correctly applied the existing Louisiana law and "stacked" the vehicles which were insured under the Travelers' policy, allowing the widows and children of three (3) decedents recovery. Try as hard

as it may, Petitioner cannot establish any jurisdictional reason for this Court's granting certiorari, nor can it logically or reasonably show any error in the Fifth Circuit's decision or application of the then prevailing Louisiana law.

Respondents believe that this Court's request for a reply to the Petition for Writ of Certiorari was based on confusion brought about by a misstatement of applicable law, in the very beginining of Petitioner's brief, on pp. 2, 3, and 4, where L.S.A.-R.S. 22:1406 D, Louisiana's uninsured-underinsured motor vehicle statute is reproduced. The misstatement occurs when Travelers cites Section D(1)(c) on page 4, with no mention that Section D(1)(c) was not in effect on the date of this accident, July 29, 1977! This § as quoted on page 4 did not come into law until several months later. (Acts 1977, No. 623 §1). In a letter dated September 21, 1981, counsel for Petitioner called this to the Court's attention. Admittedly this Section now prohibits stacking, but at the time of this accident stacking was the law of Louisiana. The amendment had no retroactive effect.

Counsel for Travelers cites two Louisiana cases, *Briley v. Falati*, 367 So.2d 1227 (La.App. 1979), and *Burns v. Fernandez*, 401 So. 2d 1033 (La. App. 1981), waving both of these decisions as menacingly as one

would wave a twig in the face of a charging bull. These cases are most easily distinguishable, and even a cursory reading thereof shows that they are not applicable. Moreover, *Burns* was decided after the Fifth Circuit rendered its decision in this matter. Even if *Burns* holds "unequivocally that stacking of uninsured motorist benefits under a fleet policy is not allowed in Louisiana", as represented by opposing counsel, this decision was not in effect when the Fifth Circuit rendered its decision herein, and is not controllng in any event.

In the *Briley* case, Liberty Mutual insured Ford Motor Company, which leased a vehicle to Bordelon Leasing, Inc., which in turn rented the vehicle to Edward A. Briley. Briley attempted to stack the uninsured motorist coverage on all vehicles insured under the Ford policy. The *Briley* Court observed that plaintiff was a permissive user of the vehicle. The policy was issued to Ford Motor Company and not to Bordelon Leasing, Inc. The concurring opinion by Judge Lemmon emphasizes that Briley was a permissive user of the vehicle who had no connection whatsoever with Ford Motor Company and who was not an insured under the policy issued by Liberty Mutual to Ford. (*Briley, supra*, at p. 1229).

Burns dealt with a plaintiff who was not "an in-

sured" under the terms of the policy. The Court observed however that "stacking by the permisive user would be permitted had the appropriate premium been paid", *supra*, page 103. With its retrorated premium basis, Fischbach paid for stacking for itself and its employees for all of its vehicles. Further the decedents here were the driver and passengers in a vehicle owned by Fischbach and insured by Travelers. Travelers stipulated that the decedents were insureds "under the terms of its policy". Clearly neither *Briley* nor *Burns* apply.

The cases relied upon by plaintiffs-respondents, and followed by the Fifth Circuit Court of Appeals, *Deane v. McGee*, 260 So.2d 669 (1972), and *Graham v. American Casualty Company*, 259 So.2d 22 (1972), are Louisiana Supreme Court decisions. *Holmes v. Reliance Insurance Company*, 359 So.2d 1102 (La.App. 1978), writs denied by the Louisiana Supreme Court on September 22, 1978, is a Third Circuit case. If *Briley* and *Burns* conflict with *Holmes*, which is not the case, at best petitioner has a split in the Louisiana Circuit Courts. Since the Louisiana Supreme Court had denied writs in *Holmes*, and since it decided *Deane* and *Graham*, the Fifth Circuit panel which included Judge Tate, a former Louisiana Supreme Court Justice, reached the proper conclusion and applied the prevailing Louisiana jurisprudential law.

Travelers cites three non-Louisiana cases, *Cunningham v. Insurance Company of North America, Va.*, 189 S.E.2d 832 (1972), *Lambert v. Liberty Mutual Insurance Company,* Ala., 331 So.2d 260 (1976), and *Marks v. Travelers Indemnity Company,* Fla. App., 339 So.2d 1123 (1976), in support of its position. A reading of the full decisions rather than the headnotes of these three cases shows that they are not applicable.

The *Cunningham* decision involved an employee of the Virginia Highway Department who was killed while driving a department vehicle. Maryland Casualty Company had issued a policy to the State of Virginia insuring some 4,300 department vehicles. The Maryland policy provided uninsured motorist protection, which the Cunningham estate attempted to stack.

In disallowing the stacking of the policy, the Virginia Supreme Court held at page 385:

> . . ."The uninsured motorist endorsement of Maryland's policy, read in light of the statute, insures the Highway Department against damage to its property resulting from the negligence of an uninsured motorist, and those who occupy its insured vehicles are insured for damages for bodily injury or death, resulting from the negligence of such uninsured motorist.

> It is conceded that Cunningham was 'occupying' a state vehicle covered by the Maryland policy when he was killed. He was not the named insured in the policy and therefore occupied the status of an *insured of the second class, as defined by statute.* As such he is entitled to the uninsured motorist coverage provided to the specific vehicle he was using or in which he was riding as a passenger or guest. He cannot pyramid the uninsured motorist coverage on the 4,367 other highway vehicles." (Emphasis supplied)

Louisiana's Uninsured Motorist Statute does not create two classes of insured persons with different benefits accruing to each class, and Petitioner has not shown that such distinction exists either in Louisiana jurisprudence or statutes. To the contrary, Louisiana's jurisprudence holds that under the law of Louisiana an omnibus insured is an insured for all purposes of coverage, and there is no difference between the named insured and the omnibus insured in delineating the extent of coverage. *Anderson v. Phoenix of Hartford Insurance Company,* (W.D.LA., 320 F. Supp. 399, 1970). Further the Travelers policy made the decedents insureds as Travelers stipulates.

In *Lambert v. Liberty Mutual Insurance Company, supra,* the Suprme Court of Alabama also recognized and acknowledged the existence of two classes of insured under its law. We further specifically call the Court's attention to the concurr-

ing opinion written by Justice Maddox, who agreed that Lambert "was not a person insured thereunder". He states at page 265: "As I view it, this court has not yet decided that particular coverage question (stacking) under a fleet policy, and I do not think we ever reach it here".

Justice Maddox further points out that the Virginia Court in *Cunningham* was not dealing with a "person insured thereunder under the primary liability provision of the fleet policy", and stated at page 266:

> ". . . .In any event, when 'stacking' is an issue, whether a person is a 'person insured thereunder' under the laibility policy——named insured or otherwise——I believe that *State Farm Automobile Ins. Co. v. Reaves*, 292 Ala. 218, 292 So.2d 95 (1974), addressed that issue. Having said this, I will await the case, should it arrive, where an individual is a 'person insured thereunder' under the primary liability policy containing fleet coverage."

We finally turn to *Marks v. Travelers Indemnity Company, supra.* In that case the son of an employee of the named insured was driving the vehicle at the time of the loss, and it was he who attempted to stack the uninsured motorist coverage. These facts differ completely from those at hand.

Through repetition of the phrase "commercial fleet insurance", Petitioner would have this Court believe that there is a difference in coverage or that the applicable UM statute and jurisprudence did not require the same coverage for this Travelers' policy. R.S. 22:1406 mandates "no automobile liability insurance covering liability. . ." with no mention of a distinction being drawn in the type of policy issued. Further this Travelers' policy, by its own terms, was not a "commercial fleet policy", but provided "family protection or uninsured motorist insurance,. . .".

The Fifth Circuit did not "refuse to address the heretofore uniform distinction between stacking commercial fleet policy uninsured motorist coverages, and personal uninsured motorist coverage" as Petitioner represents. To the contrary as a reading of its Per Curiam decisions reveals, it met the problem head on and concluded it was permissible under the prevailing Louisiana law. We are confident this Court will agree and deny the Petition for Writ of Certiorari.

RESPONSE II.

The Court of Appeals interpreted the insurance contract in accordance with the laws of Louisiana, a state in which the parties intended for the contract to apply, with no violation of either the Equal Protection Clause or Due Process Clause of the United States Constitution.

Petitioner, Travelers, places emphasis on the fact that the Court of Appeals forced a result that was not intended by the parties to the insuring agreement and that the insured, Fischbach, had no legal obligation to supply uninsured motorist protection to its employees. It supports this argument by labeling this policy a "commercial policy" rather than a "family policy". This is contrary to the testimony of the Travelers' witnesses and the policy which states: "This policy affords family protection. . . ."

Travelers tries to make much over the fact that no vehicles were listed on the policy, but Travelers stipulated that at least 1,000 vehicles were covered by its policy. Travelers would infer tht premiums were not charged for this protection, that the protection was given away gratis. It does admit to a retrorated premium computed on payroll and loss experience, and this is certainly paid for by Fischbach. A deductible is not the same as coverage.

Travelers and Fischbach certainly intended that the GMC pickup truck involved in the accident be an insured vehicle. The stacking mandated by the Louisiana jurisprudence served to increase the protection afforded to the insured individuals. What stacking does in the context of uninsured motorist in-

surance is to give the innocent victims of an uninsured tortfeasor protection and compensation comensurate with the insurance that any third party damaged by negligence would have had under the liability portions of the policy.

If two or three vehicles are stacked under one policy, why is it illogical or unjustified to stack 1,000 vehicles? This does not give rise to any violation of the Equal Protection Clause or the Due Process Clause of the Constitution, especially when the parties intended the Louisiana law to be applicable to the contract. Can Travelers plead ignorance of Louisiana law?

The authority cited by Petitioner for violation of Equal Protection and Due Process is a 1972 decision by a special three-judge district court on the question of Louisiana's Property Tax Relief Fund, *Levy v. Parker*, 346 F.Supp. 897 (E.D. La. 1972), at pp. 903-904. In analyzing "wherein the denial of equal protection lies" the court found: "Louisiana's pattern denies to the homestead owners in Orleans Parish and to those who there paid taxes on income and alcoholic beverages the same treatment the state accords to similarly situated taxpayers and homestead owners in other parishes." The court found that the taxpayers were thus discriminated against on the basis of a classification (region of residence) that was arbitrary

or capricious and not resting upon same reasonable consideration of difference or policy. The case before the court thus came within the Equal Protection Clause as it had been applied to other arbitrary instances of state action. (See 346 F. Supp. at 902).

In the instant case the question is one of application of Louisiana law to an insurance contract designed to be in effect in Louisiana, involving an accident in Louisiana between Louisiana domiciliaries. We cannot comprehend how this constitutes discriminatory state action as set forth in *Levy v. Parker*, and as claimed by Petitioner.

RESPONSE III.

The application of Louisiana law which allows stacking of the uninsured motorist protection coverage on vehicles beyond its jurisdictional limits is in compliance with the Full Faith and Credit Clause, Due Process Clause and the Commerce Clause of the United States Constitution.

There is no serious contention by Petitioner that the insurance policy in question was not constructively delivered with the Insurance Commissioner of the State of Louisiana. This is a factual

issue decided by the District Court and affirmed by the Fifth Circuit.

Moreover, the policy itself contained a specific endorsement whereby the parties (Travelers and Fischbach) amended and made a part of their contract the uninsured-underinsured motorist provisions of the law and regulations of the State of Louisiana.

It is undisputed that both Fischbach and Travelers knew that there would be numerous vehicles owned by Fischbach and located in Louisiana for use on construction projects that were an integral part of Fischbach's business.

Since the 1940's, this Court, recognizing the mobility of our society, has not followed the so called "single proper law" approach, which Petitioner would now have this Court adopt. See, Leflar, *American Conflicts Law* §55 (3d Ed. 1977). Typical of modern cases, *Richards v. United States*, 369 U.S. 1 (1962), provides:

> "Where more than one state has sufficiently substantial contact with the activity in question, the forum state, by analysis of the interests possessed by the states involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity." At page 15.

Thus, as long as the state has substantial contacts to the transaction in question, its substantive law will be applied. See, *Richards v. United States, supra; Carroll v. Lanza*, 348 U.S. 66 (1945).

Louisiana follows the substantial contacts test. See, *Jagers v. Royal Indemnity Company*, 276 So.2d 309 (1973). The only state that has substantial contacts with this litigation is Louisiana.

Respondents submit that any question or doubt about this approach was recently put to rest by this Honorable Court in its decision in the case of *Allstate v. Hague*, 101 S.Ct. 633 (1981). In this case, Allstate had issued a policy of insurance in the State of Wisconsin covering three vehicles owned by the decent, a resident of the State of Wisconsin. The decedent was killed in Wisconsin by an uninsured motorist who was also a resident of Wisconsin. Suit was filed in Minnesota, a state which permitted stacking, and Minnesota applied its own law despite the fact that *lex loci contractus*, i.e., the law of Wisconsin, prohibited stacking. This Honorable court affirmed the decision, finding adequate grounds for the Minnesota Court to apply Minnesota law.

This Court in *Allstate* observed in footnote 22:

"If the law of a jurisdiction other than

> Wisconsin did govern, there was a substantial likelihood, with respect to uninsured motorist coverage, that stacking would be allowed. Stacking was the rule in most States at the time the policy was issued. Indeed, the Wisconsin Supreme Court, in *Nelson v. Employers Mutual Casualty Co.*, 63 Wis.2d 558, 563-566, and nn.2-3, 217 N.W.2d 670, 672-674, and nn.2-3 (1974), identified 29 States, including Minnesota, whose law it interpreted to allow stacking, and only 9 States whose law it interpreted, to prohibit stacking. Clearly then, Allstate could not have expected that an anti-stacking rule would govern any particular accident in which the insured might be involved and thus cannot claim unfair surprise from the Minnesota Supreme Court's choice of forum law."

In the case at hand, the vehicles involved in the accident were being driven on a Louisiana highway, by Louisiana domiciliaries, and the Fischbach vehicle was insured by a policy which was written to provide coverage to vehicles being driven in Louisiana. The policy was delivered in the State of Louisiana, and contained a specific Louisiana endorsement. The application of Louisiana law in this case is more compelling than the application of Minnesota law in *Allstate*.

IV.

The Court of Appeals for the Fifth Circuit applied the appropriate Louisiana law.

The controlling Louisiana case on stacking for the facts involved in this litigation was at the time of the Fifth Circuit reached its decision and remains today, the matter entitled *Holmes v. Reliance Insurance Company, et al, supra.* Plaintiffs were injured in an automobile accident which occured in Grant Parish, Louisiana. Mr. Byoune was driving one of the vehicles involved, and Holmes and his minor son, Wayne, were riding as guest passengers. The Byoune vehicle was owned by Humphrey Chevrolet Company, Inc. of Evanston, Illinois, which employed Mr. Byoune as a salesman. That automobile was a demonstrator and was insured on a policy issued by Reliance Insurance Company to the Illinois Chevrolet Company. The policy insured this vehicle and 159 others. The accident was found to be the result of the negligence of Titus Parker who was an underinsured driver. Three issues were presented to the Court of Appeal, one of which was whether the uninsured motorist coverage on all 160 vehicles, afforded under the Reliance policy to the Illinois automobile dealership, could be stacked to satisfy the damages awarded to the plaintiffs. At the time of the accident, the only vehicle belonging to Humphrey Chevrolet which was located in the State of Louisiana was the demonstrator which Mr. Byoune was transiently driving with the knowledge and consent of Humphrey Chevrolet. The Court allowed stacking of all the

vehicles insured under the policy.

The Court stated that Reliance's liability to the plaintiffs rested solely upon its contractual obligations with Humphrey Chevrolet, because it provided uninsured motorist coverage by protecting the plaintiffs who were insureds as defined in the uninsured motorist part of Reliance's policy. The Louisiana Supreme Court denied writs. [362 So.2d 1120 (1978)].

Here the District Court and the Fifth Circuit Court of Appeals in its affirmation properly allowed the stacking of coverage on all vehicles insured under the policy. The *Holmes* decision followed two Louisiana Supreme Court decisions, *Deane v. McGee, supra,* and *Graham v. American Casualty, supra,* and *Sutton v. Langley,* 330 So.2d 231 (La.App. 1976), a 1976 Louisiana Appellate decision. The Fifth Circuit stated it best: "We have carefully reviewed the authorities cited by the parties and we find that the District Court properly evaluated and applied the then prevailing Louisiana law. We are persuaded of the correctness of the District Court's conclusions." (Petitioner's Appendix page 32).

As a final note in response to opposing counsel's statement that he attempted for almost two and one-half years to have the United States District Court and the United States Court of Appeals acknowledge

the existence of the *Briley* decision, we submit that the Courts below loudly acknowledged its existence by not mentioning it. Since counsel for Travelers could not understand the acknowledgment, Judge Brown, in the Per Curiam denial of the rehearing, explained it to him plainly: *Briley* does not apply to these facts! We are confident this Court will agree. We apologize for finding no appropriate quote from Humpty-Dumpty or another fairy tale. Perhaps a more diligent study of Shakespeare's *Much Ado About Nothing* would be efficacious.

Since preparing the above, we have become aware of the case of *Suhor v. Gusse*, 403 So.2d 83 (4th Cir. 1981). We cite this case to fully apprise this Court of all pertinent decisions. Respondents aver that *Suhor* has no application for it deals with an attempt to stack coverages on separate vehicles insured under separate policies rather than multiple vehicles being insured under a single policy. It further apprears to respondents that the Fourth Circuit has retreated from the position it took in *Briley, supra*, and *Burns, supra*, and now recognizes that the issue of the stacking of multiple vehicles insured under a single policy had previously been decided by the Louisiana Supreme Court as per *Graham, Deane* and *Holmes*. In its Per Curiam decision denying rehearing, the Fourth Circuit cited *Barbin v. U.S.F. & G.*, 315 S.2d. 754

(La.1975), *Wilkinson v. Fireman's Fund Ins. Co.*, 298 So.2d 915 (La. App.3rd Cir. 1974), (both of which cases followed *Deane* and *Graham*), and *Holmes*, and said:

> ". . .But, apart from their implied conflict with Seaton, *the supreme court's latest decision in this area*, the declarations of Barbin, Wilkinson and Holmes are not applicable to our case, because those cases involve a single policy with more than one vehicle insured rather than separate policies." (Emphasis supplied.)

We believe this Court is persuaded by the correctness of the Fifth Circuit's conclusions.

V.

The Supreme Court should not grant certiorari in this case because none of the considerations mandated by Rule 17 are present.

While the Supreme Court has a right to review a decision of the Federal Court of Appeals in practically every instance, this exercise of jurisdiction is generally limited or prescribed within certain guidelines as set forth in Rule 17 of the Rules of the Supreme Court of the United States. As Chief Justice Taft pointed out:

> "The jurisdiction [of the Supreme Court to

> review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."
> *Magnum Co. v. Coty*, 262 U.S. 159 (1923) at p. 163.

As is apparent from the brief and appendix filed by petitioner, there is no conflict between the decision by the Fifth Circuit and the decision of any other Federal Court of Appeals. Respondents submit that there has been no departure from the applicable State law, as applied by the Court of Appeals, to call for the exercise of this Court's power of supervision. The statute which was in effect at the time of the accident, which forms the subject of this litigation, has been amended in a manner which would prevent this problem from arising in the future. The issue, accordingly, lacks vitality. This reason alone is sufficient for this Court to deny certiorari. *United States v. Abrams*, 344 U.S. 855 (1953).

The only question of Federal law presented by petitioner is set forth in its argument that the interpretation of Louisiana law applied by the Fifth Circuit violates the Equal Protection Clause and the Due Process Clause of the United States Constitution. As we have set forth above, such sweeping and arbitrary

discrimination has not been shown and does not exist.

Petitioner has not demonstrated any violation of the Commerce Clause of the United States Constitution. Any argument directed to the violation of the Commerce Clause represents an argument that was not raised below, (nor do we understand the issue from reading Petitioner's argument) and hence is not a proper matter for review on writ of certiorari to this Court. *Youakim v. Miller,* 425 U.S. 231 (1976). In the absence of specifity we know not how to respond.

CONCLUSION

For the above and foregoing reasons, the undersigned counsel respectfully suggest that this Court deny the Petition for Writ of Certiorari, forthwith.

Respectfully submitted,

MARS & MEDO
THEODORE A. MARS., JR.
STEVEN O. MEDO, JR.
Attorneys for Respondents
Mrs. Rita Breitling Cook, et al
Mrs. Marie T. Bannon, et al
1220 First NBC Building
New Orleans, Louisiana 70112
(504) 581-7700

By: _____

By: _____

SILVESTRI, MARINARO &
MASSICOT
JOHN PAUL MASSICOT
Attorney for Respondents
Mrs. Constance A. Fenasci, et al
577 South Carrollton Avenue
New Orleans, Louisiana 70118
(504)866-9631

By: _____

CERTIFICATE OF SERVICE

We hereby certify that forty (40) copies of this brief in response to the Petition for Writ of Certiorari have been served upon the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, by depositing them in the United States Mail, postage prepaid, certified, and addresed to him in Washington, D.C. 20543, on the day of November, 1981.

We further certify that a copy of the foregoing has been served upon the following Attorney of Record for Petitioner, by hand delivering a copy to him this date:

Mr. John Combe, Jr.
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
Attorney for Petitioner
18th Floor - 225 Baronne Street
New Orleans, Louisiana 70112
(504) 581-6641

MARS & MEDO
THEODORE A. MARS, JR.
STEVEN O. MEDO, JR.
Attorneys for Respondents
Mrs. Rita Breitling Cook, et al
Mrs. Marie T. Bannon, et al
1220 First NBC Building
New Orleans, Louisiana 70112
(504) 581-7700

By: _____

By: _____

SILVESTRI, MARINARO &
MASSICOT
JOHN PAUL MASSICOT
Attorney for Respondents
Mrs. Constance A. Fenasci, et al
577 South Carrollton Avenue
New Orleans, Louisiana 70118
(504) 866-9631

By: _____